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Supreme Court of the United States.

TRANSAMERICAN FREIGHT LINES, INC.,
Petitioner,

v.

LOCUST CARTAGE CO., INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

[redacted]

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above-entitled case on August 3, 1970.

Opinions Below.

Cross-motions for summary judgment as to count I of Respondent's (plaintiff and appellant below) action against Petitioner (defendant and appellee below) were heard before the United States District Court for the District of Massachusetts. Summary judgment as to count I was awarded for Petitioner in an opinion which is appended hereto as Appendix A but which is unreported.

The judgment was reversed on appeal to the United States Court of Appeals for the First Circuit in an opinion which is appended hereto as Appendix B and which is reported as No. 7496 in the First Circuit's advance opinions.

Jurisdiction.

The judgment of the Court of Appeals was entered on August 3, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

Questions Presented for Review.

1. May Petitioner be deprived of due process of law and of its federal constitutional right to a trial of the issues as provided by Amendments V and VII of the United States Constitution by the ruling of the Court of Appeals that findings of the Interstate Commerce Commission, based on assumptions not heard by the Commission, and considered merely advisory by all parties concerned—including the District Court and the Commission itself—were final and binding on the District Court?

2. May the function of the District Court as the ultimate trier of fact be usurped by the Court of Appeals?

3. A further ruling of the Court of Appeals characterizes the Respondent as an independent common carrier with respect to the transportation involved and then allows one common carrier to recover from another common carrier the difference between its published tariff and an agreed charge between the two, and in so doing also disallows the doctrines of estoppel and *pari delicto*. These rulings of the Court of Appeals are not in accord with the law and are also specifically in conflict with the decision of the Court of Appeals for the Fourth Circuit in *Norfolk Southern Bus Corp.* v. *Virginia Dare Transportation Co., Inc.*, 159 F. 2d 306 (1947), cert. den. 331 U.S. 827; is also in conflict with the only other pertinent court decision of which Petitioner is aware, to wit: *Shirks Motor Express Corp.* v. *Forster Transfer & Rigging Co., Inc.*, 133 A. 2d 59 (Md. 1957); is also in conflict with the principles enunciated in *Murphy*

Motor Freight Lines, Inc., Investigation and Revocation of Certificates, 99 M.C.C. 707 (1965); and is a question of fundamental importance that should be decided by the United States Supreme Court.

Constitutional and Statutory Provisions Primarily Involved.

UNITED STATES CONSTITUTION.

Amendment V:

> ". . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law . . ."

Amendment VII:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Statement of the Case.

On December 30, 1964 Plaintiff-Respondent (hereinafter called Locust) brought this action against Defendant-Petitioner (hereinafter called Transamerican) in the Superior Court of the Commonwealth of Massachusetts to collect alleged undercharges for transportation performed in 1962, 1963 and 1964 to and from points within Massachusetts beyond the so-called Boston commercial zone and Transamerican's terminal within the said zone. Transamerican removed the case, on the grounds of diversity jurisdiction, to the United States District Court for the District of Massachusetts. 28 U.S.C. Secs. 1332 (a), 1441 (a).

On November 29, 1966, the District Court ordered the parties to seek an informal advisory opinion from the Interstate Commerce Commission as to the tariffs properly applicable between them and requested the Commission to base its decision on the following four assumptions (for the full order see Appendix C):

> "1. That there was an oral agreement on a novation of a written agreement under which Locust Cartage Co., Inc., agreed to carry for Transamerican Freight Lines, Inc., goods which were covered by shipping contracts between Transamerican Freight Lines, Inc., and its customers.
>
> "2. That the actual carriage was within the points to which Transamerican Freight Lines Inc., was authorized by the I.C.C. to carry goods.
>
> "3. That the shipper paid to Transamerican Freight Lines, Inc., precisely the amount that was appropriate if the total carriage was by Transamerican Freight Lines, Inc.
>
> "4. That Transamerican Freight Lines, Inc., did not have complete control of the operation of Locust Cartage Company, Inc."

By letter dated March 1, 1967 (Appendix D), the Commission rendered to the District Court such an informal opinion, predicated on the assumptions enunciated in the District Court's order.

When the matter was called for trial in October of 1967, the District Court granted Transamerican's motion to stay action in that court and ordered Transamerican to seek a hearing and a declaratory order before the Interstate Commerce Commission. The resultant decisions, both of the hearing examiner (Appendix E) and of Division 2 of the Commission (335 I.C.C. 46, Appendix F), were grounded

on the four assumptions placed before the Commission by the District Court in 1966.

After completion of these Commission proceedings, the matter was again called for trial by the District Court. Both parties filed motions for summary judgment, in accordance with Rule 56 of the Federal Rules of Civil Procedure, on count I of Locust's complaint and related counterclaims, based upon a stipulation of facts executed by the parties for this purpose (Appendix G). The stipulation assumed the above assumptions although Transamerican specifically disputed assumptions one and four.

The District Court granted judgment for Transamerican on count I of the complaint (Appendix A). The District Court rejected the Commission's findings because they were not supported by the evidence, because the Commission's report was merely advisory and because the Commission had preceded on the mistaken premise that the District Court assumed Locust had been acting as an independent carrier (Appendix A, pages 4, 5). Locust appealed to the Court of Appeals for the First Circuit which reversed the District Court holding that said District Court was bound by the Commission's determinations (Appendix B).

Reasons for Granting the Writ.

Certiorari should be granted because the Court of Appeals' decision, in effect (1) deprived Petitioner of its federal constitutional right to a trial of the issues, (2) denied it due process of law, (3) infringed on the function of the District Court as the ultimate trier of fact, and (4) contains errors of law and is in conflict with the decision of the Fourth Circuit in *Norfolk Southern Bus Corp* v. *Virginia Dare Transportation Co., Inc.*, 159 F. 2d 306 (1947), cert. den. 331 U.S. 827. The latter aspect is a conflict which

should be resolved by this Court, while the first three involve important questions of constitutional law and guarantees which should be reviewed by the Supreme Court.

1. PETITIONER'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND TO A TRIAL OF THE ISSUES.

Amendments V and VII to the United States Constitution guarantee Transamerican due process of law before it can be deprived of its property, as well as the right to a trial of facts before an impartial tribunal. "The due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial function involved. That includes the right to introduce evidence and have judicial findings based upon it." *Baltimore & Ohio Railroad Co.* v. *United States*, 298 U.S. 349, 368-369. Mr. Justice Brandeis, in *Akron, Canton & Youngstown Railway Co.* v. *United States*, 261 U.S. 184, 200, defined a full hearing as

> "... one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken."

The statement in *In re Murchison*, 349 U.S. 133, 136 that "A fair trial in a fair tribunal is a basic requirement of due process," demands that a tribunal accord a fair hearing to the parties involved, act impartially upon all the evidence assembled, and repudiate any arbitrary or unwarranted actions. These essentials of due process are not binding solely on courts and judges, but on any agency or board empowered by Congress with quasi-judicial authority. It cannot be denied that administrative agencies must provide the full measure of due process before their orders

will be accepted and enforced by the judiciary. *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 51, 52; *Baltimore & Ohio Railroad Co.* v. *United States, supra*, 364, 368-369; *Morgan* v. *United States*, 304 U.S. 1, 14-15, 22. Indeed, the Interstate Commerce Commission is required by Congress to provide ". . . those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature." *Morgan* v. *United States, supra*, 19[1]

Intentionally, but neither arbitrarily nor with the desire to prejudice the parties, the Interstate Commerce Commission, when presented with this matter as a result of Transamerican's motion to the District Court in October of 1967, refused to accord the full measure of due process to the parties. In doing so, it clearly indicated its belief that the District Court would provide all the requirements of "fair play" and judicial process when the parties were again before it. That due process of law was denied Transamerican is evidenced by both the initial examiner's and Division

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[1] For example, 5 U.S.C. A. § 556 (Administrative Procedure Act) provides in part:

. . . . . .

(b) ". . . The functions of all presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. . . .

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

. . . . . .

(3) rule upon offers of proof and receive relevant evidence,

. . . . . .

(d) . . . any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. . . ."

2's statements that the Commission's reports were predicated on the four assumptions initially placed before the Commission by the District Court in 1966.[2] By accepting these four assumptions as "givens," the Commission surely failed to provide Transamerican with a fair hearing because in doing so it precluded any dispute on their validity.

But, as stated before, this acceptance by the Commission was not intended to prejudice the parties. Rather the Commission frequently reiterated that the District Court would entertain all arguments and would itself resolve the dispute, in accordance with the Commission's understanding that its task was merely one of advising the District Court, assisting by limiting itself to the assumptions formulated by the Court. Thus, the hearing examiner expressed his intention of not "usurping the function of the Court" (Appendix E, p. 5) and Division 2, reviewing the examiner's report and responding to Transamerican's argument that the Commission's reliance on the assumptions denied it its right to a trial of the disputed facts, stated unequivocally:

> "There can be little doubt as to the meaning of the court's wording. *To alter it in any way would usurp the function of the court as the ultimate trier of the facts.* This can in no way be construed as a deprivation of the petitioner's rights to a 'trial.' *The court is providing that right. The function of this Commission in this proceeding is to render administrative aid to the Court*" (Appendix F, p. 50). (Emphasis supplied.)

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[2] The hearing examiner stated that his ". . . determination is to be based on certain assumptions hereinafter enumerated" (Appendix E, page 1), and that ". . . the Commission is requested to rule on the tariffs applicable to these movements, based on certain assumptions which are as follows. . . ." (Appendix E, page 3). Division Two of the Commission stated that ". . . the examiner was correct in confining his consideration of the issues to those reflecting the court's assumption" (Appendix F, page 50).

Thus, the Commission clearly stated that it regarded its role in the present matter as solely advisory, and the role of the District Court as "the ultimate trier of the facts." The District Court, too, was of the same view. As the ultimate trier of the facts, the District Court elected to reject the Commission's report, as "the report is only advisory," and "on the evidence before it . . . substitute this Court's own findings and conclusions . . ." (Appendix A, pp. 5, 6). That this was the District Court's intention from the beginning is buttressed by the notation on the docket that the "court retains jurisdiction." (Appendix H, docket, P. IV).

With the District Court, the ultimate trier of the facts, there was no denial of due process to either party, nor of their federal constitutional right to a trial of the issues. Neither Transamerican nor Locust has challenged the District Court's decision on those grounds.

But although the District Court's decision did not deny the constitutional safeguards provided by Amendments V and VII, the decision of the Court of Appeals did. By instructing the District Court to align its conclusions with those contained in the Commission's report, the Court of Appeals, in effect, ruled that the four assumptions upon which the Commission's report was based were binding. It rendered this opinion in the face of direct statements of both the Commission and the District Court that the Commission's task in the dispute was only advisory.

The Court of Appeals ignored the principle enunciated by the Supreme Court that the discretion of an administrative agency can only be reviewed if it is abused. *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 142. Surely the decision of the Commission in this instance, to limit its role to that of advisor whose recommendations are in no way final or binding, is not an abuse of the discretion granted to it. "The Commission is an administrative body and can exercise only the powers delegated to it by Con-

gress, but in the application and interpretation of the powers conferred it exercises judgment and discretion." *United States Ex rel. Chicago Great Western R. Co.* v. *Interstate Commerce Commission*, 71 F. 2d 336, 340 (Court of Appeals, District of Columbia), cert. granted, 293 U.S. 545, affirmed, *United States* v. *Interstate Commerce Commission* 294 U.S. 50, reh. den. 294 U.S. 731.[3]

The Court of Appeals recognized (Appendix B, pp. 8-9) what it termed an ambiguity contained in the Commission's statement, but held the hearing examiner had reached his decision on an independent study of the evidence as well as on the District Court's four assumptions. Division 2 of the Commission, however, stated that "the examiner concluded that [certain facts] gave credence to the assumption that there was an independent operation by Locust" (Appendix F, p. 48). Thus, the Commission only concluded that there was sufficient evidence to substantiate the assumptions of the District Court. But the assumptions, as the District made clear in its decision on the cross-motions for summary judgment, were not final decisions but merely assumptions.

The conclusion of the Commission that there was substance for such assumptions did not compel the District Court to convert them into final decisions. Nor did the Commission attempt to attach such complusion in its report. Again, its categorical statement that its function in this proceeding was only to render administrative aid to the District Court must be mentioned. As the District Court had originally generated the assumptions, it was solely the District Court's decision whether they should be abandoned or retained. The decision of the Court of Appeals assigns

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[3] See also the passage in *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503, 512, to the effect that there is a presumption that the Commission has properly performed its official duties and that this presumption supports its acts in the absence of clear evidence to the contrary.

this final and vital determination to the Commission, which, itself, had earlier rejected any such power.

A further point demonstrates the advisory capacity of the Commission's report. The form of Division 2's report is significant in this case At the conclusion of its report (Appendix F, p. 51), the Commission details a finding but *no* order other than that the proceeding be discontinued. This report is thus closely parallel to the Commission report analyzed in *Shannahan* v. *United States*, 303 U.S. 596, 598. In that case, the Commission announced its finding but the Supreme Court noted that "No order was entered thereon by the Commission." As the Commission's decision was not an order, it could not be enforced by the Commission and, therefore, was not amenable to review by the courts. Thus, *Shannahan*, as well as the instant case, falls within the declaration contained in *United States* v. *Atlanta, Birmingham & Coast. Railroad Co.* 282 U.S. 522, 527-528:

> "The action here complained of is not in form an order. It is part of a report—an opinion as distinguished from a mandate. The distinction between a report and an order has been observed in this practice of the Commission ever since its organization—and for compelling reasons. Its functions are manifold in character. . . . No case has been found in which matter embodied in a report and not followed by a formal order has been held to be subject to judicial review."

If such promulgations are not subject to judicial review, it is surely because they are not final or binding on the parties involved. If they were, then judicial review would be a necessity to prevent abuse of the Commission's discretion. There is no order contained in the report of Division

2, which report supersedes the recommendations of the hearing examiner. As the report is not subject to judicial review, it was clearly intended by the Commission to be advisory, as the Commission itself repeatedly points out. The District Court did not attempt to review the report of the Commission but, rather, considered its advice, along with all the other relevant evidence preparatory to reaching its decision. The Court of Appeals, by its decision, attaches greater authority to the Commission's report than it deserves, or was intended, to have; and in so doing, circumvented findings of fact properly made by the District Court.

Finally, the District Court made its decision in response to the submission of cross-motions for summary judgment and based on the stipulation of facts submitted with the motions. In such cases, the judgment is rendered as a matter of law, no facts being contested for the purpose of the motions. Federal Rules of Civil Procedure, Rule 56 (c). And it cannot be gainsaid that whatever conclusion of law were reached by the Commission, although entitled to respectful consideration of the courts, they ". . . do not have the same claim to finality as do the findings of facts made by the Commission." *Levinson* v. *Spector Motor Service,* 330 U.S. 649, 672. The Court of Appeals, in ruling that the District Court must coincide its conclusion with that of the Commission, was clearly in error.

As the report of the Commission was purely advisory and intended by the Commission to be so, the District Court was not bound by the report—based as it was on various assumptions—and was not foreclosed from entering a decision opposed to it. To affirm the decision of the Court of Appeals, holding in effect that these assumptions are valid and binding, would deprive Transamerican of its federal constitutional rights to due process of law and to a trial of the issues, which was provided by the District Court.

2. The District Court as Ultimate Trier of Fact.

Amendment VII to the United States Constitution provides that ". . . no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." The Supreme Court, in *Parsons* v. *Bedford*, 3 Peters 433, 446, found that the popular acceptance of this amendment was ". . . so general as to establish its importance as a fundamental guarantee of the rights and liberties of the people." This amendment has, since its inception, been interpreted as providing that ". . . in the absence of express or implied consent to the contrary, issues of law are to be resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the court." *Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U.S. 654, 657. Neither the Supreme Court nor the Court of Appeals can redetermine facts found by the jury. *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.* 369 U.S. 355, 358-359, reh. den. 369 U.S. 882.

In the present case, however, there was a waiver of a trial by jury. Thus, the District Court was correct in substituting itself for the jury and performing the functions ordinarily allocated to the jury. *Baylis* v. *Travellers' Insurance Co.* 113 U.S. 316, 320-321; Federal Rules of Civil Procedure, Rule 39 (a) (1). Because it has assumed the role of trier of fact and thus, in effect, has become the jury, the District Court's findings of fact cannot be redetermined by the Court of Appeals.

Specifically, the District Court, based upon the facts set forth in the stipulation, concluded as a fact that Locust was not acting as an independent common carrier with respect to the involved transportation. This fact, supported by the evidence, and once established by the District Court, should be binding upon the Court of Appeals.

But the decision of the Court of Appeals has not adhered to this traditional and honored principle. By instructing the District Court to follow the conclusions of the Commission's report, the Court of Appeals has usurped the authority and duty of the District Court as ultimate trier of fact. This is in conflict with the more than century-old delineation of the judiciary's responsibility between issues of fact and law.

3. Errors of Law and the Conflict of the Court of Appeals' Decision with that of the Fourth Circuit.

It has been Transamerican's position throughout these proceedings that Locust, in order to recover on count I, must established two simple, albeit illusive, facts: namely, that Transamerican was a shipper and Locust a carrier with respect to the involved transportation. The basis of this contention is that actions for undercharges lie only against shippers. The fact that Transamerican was not a shipper, therefore, should, by itself, preclude recovery. That Transamerican is not a shipper has been affirmed by the Commission, the District Court and the Court of Appeals and is correct as a matter of law, because one cannot be a shipper of goods when it is itself responsible as a carrier for the movement of these goods. *Scott Bros., Inc., Collection and Delivery Service*, 4 M.C.C. 511, 559 (1938).

The Commission found that Transamerican was not a shipper, but refused to find that Locust was not a carrier because of assumption four. The District Court, disregarding the latter, found that Locust was not acting as an independent common carrier with respect to this transportation. However, Transamerican believes that whether Locust was or was not a common carrier is irrelevant since, in any event, Transamerican was not a shipper.

Assuming for the moment, however, that asumption four set out above is valid and that Locust was acting as an independent common carrier—contrary to the decision of the District Court—the decision of the Court of Appeals enabling Locust to collect from Transamerican the difference between its published tariff and an agreed change between the two, and forbidding Transamerican the defenses of estoppel and *pari delicto*, were errors of law. They are in conflict with the only two decisions confronted with this peculiar fact situation—*i.e.*, where one carrier has sought undercharges from another carrier—of which petitioner is aware. Petitioner submits that these two cases are in point and are ruling precedents for its position.

The instant case is not the simple case of where a carrier has failed to collect its published tariffs from a *shipper* and sues to collect undercharges. Transamerican recognizes the requirements of the Interstate Commerce Act which compel carriers to collect their charges from *shippers*. However, Transamerican maintains that the rules of law applicable to recovery of undercharges from shippers do not apply to the present case, where two carriers are involved rather than a shipper and a carrier, and especially where the actual shippers, not involved in this dispute, were stipulated to have paid the appropriate tariffs filed by Transamerican from point of origin to point of destination.

Locust should not be allowed an extension of the remedy available to carriers against shippers for undercharges. The Supreme Court has stated that actions for undercharges "... are allowed not for the benefit of the carrier, but for the protection of the public. . . . A carrier invoking such a right has no standing in a Court of justice to ask that it might be enlarged by construction." *Pittsburgh &c. Railway Co.* v. *Fink*, 250 U.S. 577, 582. *Louisville &c. Railroad Co.* v. *Maxwell*, 237 U.S. 94, 97.

In this context, the position of Transamerican is well stated by *Little Rock & M. R. Co.* v. *St. Louis S. W. Ry. Co.* 63 F. 775, 781 (8th Cir., 1894).

> "The law should be as liberally construed in favor of commerce among the states as its language will permit; but, when complaint is made or relief is sought solely or mainly in the interest of the common carriers engaged in the transportation of such commerce, the act complained of or right asserted should not rest on any doubtful construction, but should clearly appear to have been forbidden or conferred."

In any event, *Norfolk Southern Bus Corp.* v. *Virginia Dare Transportation Co., Inc.*, 159 F. 2d 306 (4th Cir. 1947), cert. den. 331 U.S. 827, and *Shirks Motor Express Corp.* v. *Forster Transfer & Rigging Co., Inc.*, 133 A. 2d 59 (Md. 1957), both express the opinion that the legal doctrine of *pari delicto* is sufficient to prevent one common carrier from seeking undercharges from another common carrier in circumstances such as exist in the present case. In *Norfolk*, the parties, two common carriers, entered into an agreement to divide revenues, which contract became unlawful and void. One of the parties claimed it was entitled to recover for services to the other. The Court held, at pp. 311-312, that the parties were *in pari delicto* and that there could be no recovery for such services. The situation in this case exactly parallels the instant one and should be regarded as controlling.

In *Shirks*, the Court denied recovery to one carrier seeking undercharges from another carrier, stating on page 65 that:

> "The appellant, having entered into this illegal contract with the appellee, was *in pari delicto* with the appellee, and must take the consequences. He has

already received payment of the price of hauling which he agreed upon, and as to that the Court must leave the parties in *statu quo*. But since the hauling was in violation of the statutes and regulations, we think he cannot invoke the Court's aid in recovering the full published tariff rate in a transaction which was illegal from its inception, and as to which he stood in *pari delicto*."

Further, in the stipulation (Appendix G) and in the District Court's decision (Appendix A), it is clear that Locust was aware that Transamerican charged its customers according to its local tariff and not on a combination of local rates basis; that Transamerican was paid according to its tariffs; that all the transportation was carried on through bills of lading issued by Transamerican and never by Locust; that Locust was never named as a carrier on any shipping documents; that Transamerican handled all claims for freight damage even where the damage was caused by Locust. Locust was also aware that Transamerican bore much of the former's expenses normal to the operations of a common carrier such as billing collection, claims handling, terminal costs, business production and equipment. Aware of all these facts, Locust never, until after termination of the contract, indicated that it was entitled to collection of its published tariffs from Transamerican. Locust also knew that Transamerican could not charge its customers any more than its published tariffs.

As Locust was aware of all of the above, Transamerican contends that Locust is estopped from claiming alleged undercharges from it. See *Missouri Pacific Railroad Co.* v. *National Milling Co., Inc.*, 409 F. 2d 882 (3d Cir. 1969). The principle of estoppel should bar any recovery by Locust. It is clear that estoppel would be operative at com-

mon law. *Button* v. *Atchison, Topeka & Santa Fe Railroad Co.*, 1 F. 2d 709 (8th Cir. 1924). The remedy sought here by Locust is based wholly on statute. The rule is one of strict proof wherein Locust must show a violation clearly and directly and not by inference. *Parsons* v. *Northwestern Railroad Co.*, 167 U.S. 447, 455.

"The Supreme Court has frequently commented on the hardship inflicted upon shippers by suits of this character. . . . They are allowed not for the benefit of the carrier, but for the protection of the public. . . . A carrier invoking such a right has no standing in a court of justice to ask that its right be enlarged by construction." *Button* v. *Atchison, Topeka & Santa Fe Railway Co., supra,* 712.

In this case there is no underlying public policy which would justify the withholding of the defense of estoppel as between carriers, in contrast to a shipper-carrier relationship. Even as to a shipper in a proper case, it has been held that estoppel may bar a carrier's claim for its tariff charges. *Missouri Pacific Railroad Co.* v. *National Milling Company, Inc., supra.* The equities in this case are with Transamerican. It is Locust which is attempting to collect a windfall by avoiding its admitted contractual undertaking. Transamerican contends that the facts of this case require the application of estoppel to prevent results contrary to good conscience and fair dealing.

Moreover, since Locust was aware that the billings to shippers were on the basis of Transamerican's published tariffs from point of origin to point of destination, Locust is presumed to have established a through route applicable to such transportation between such points. *Hausman Steel Co.* v. *Seaboard Freight Lines, Inc.*, 32 M.C.C. 31, 37 (1942). Also see *Cincinnati, New Orleans & Texas Pacific Railway Co.* v. *Interstate Commerce Commission*, 162 U.S. 184 (1896). Under such an implied arrangement, the division of revenue would be in accordance with the contract.

Indeed, it is important to note that the division of the charges after the concurrence was as provided in the contract. If Locust believed the division was unfair, it should have utilized the procedures set forth in section 216(f) of the Motor Carriers Act of 1935—49 U.S.C. 316(f). A simple technical violation such as failing to file a concurrence should not contravene the basic intent of the parties. See, *e.g. Ets-Hokin & Galvin, Inc.* v. *Maas Transport, Inc.*, 380 F. 2d 258, 260 (8th Cir. 1967).

Indeed, such technical violations have been overlooked by the Commission itself in order to further the national transportation policy. *Murphy Motor Freight Lines, Inc. —Investigation and Revocation of Certificates*, 99 M.C.C. 707 (1965). The *Murphy* case is strikingly similar to the case at bar and Transamerican submits is dispositive of the relationship between the parties.

Conclusion.

For the reasons set forth above, it is respectfully requested that this petition for a writ of certiorari be granted.

Respectfully submitted,

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Attorneys for Petitioner.

Appendix A

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

LOCUST CARTAGE CO., INC.

v. CIVIL ACTION NO. 65-144-W

TRANSAMERICAN FREIGHT LINES, INC.

OPINION
October 28, 1969

WYZANSKI, Chief Judge

Plaintiff, a Massachusetts corporation, brought this action in the Superior Court of the Commonwealth of Massachusetts against defendant, a Delaware corporation. The latter removed the case, on the ground of diversity jurisdiction. 28 U.S.C. secs. 1332(a), 1441(a).

Only count 1 is now before this Court. As to it each party has filed a motion for summary judgment. Plaintiff claims $145,977.44 and interest, being the difference between what defendant paid plaintiff for transportation services from February 8, 1962 through October 15, 1964 and what is alleged to be due under plaintiff's tariffs published by New England Motor Rate Bureau Inc.

The parties have stipulated all the facts. This Court accepts the stipulation and will refer to so much of it as it deems relevant.

Defendant is a motor common carrier of general commodities in several states, including Massachusetts. The ICC has authorized it to engage in interstate transportation. The Massachusetts DPU has authorized it to engage in Massachusetts intrastate transportation. All the transportation here involved is within the authorized area.

Plaintiff is the successor of an individual Paul C. Ryan who did business as Locust Cartage Company. Both the individual and the successor corporation, plaintiff herein, operated solely within Massachusetts.

December 26, 1961, Ryan, who then had no operating authority from any public body, agreed with defendant to perform all pickup and delivery services between defendant's Medford terminal and other points in Massachusetts, both within and without the commercial zone of Boston. Service outside the commercial zone of Boston was to be performed under a separate lease-of-equipment arrangement.

February 8, 1962 Ryan purchased the corporate stock of All Mass. Service Inc., a motor common carrier. The Massachusetts DPU approved. Admittedly, it was unnecessary for ICC to appr[illegible]. See sections 5 and 212(b) of the IC Act. The acquired corporation changed its name to Locust Cartage Company, Inc., effective March 29, 1962. Under that name it is here as plaintiff.

The Massachusetts DPU authorized plaintiff to transport general commodities in intrastate commerce in Massachusetts. Plaintiff registered its Massachusetts certificate with the ICC pursuant to the second proviso of section 306(a)(1) of the IC Act. The ICC issued an appropriate federal certificate.

Ryan had been a party to the agency tariffs published by New England Motor Rate Bureau, Inc. Plaintiff adopted those tariffs. They were applicable only to shipments within the Commonwealth.

Plaintiff maintained its sole terminal at defendant's Medford terminal. For that service plaintiff paid defendant a monthly rental.

Defendant did not control plaintiff's operations. But virtually 100% of the business plaintiff did was to effect the transportation here involved.

All this transportation was performed under bills of lading executed in defendant's name. In its name were all receipts, waybills, and other documents. Plaintiff was never named as carrier or shipper.

Only the defendant solicited the relevant transportation business from the general shipping public. Only defendant billed for and collected the amounts charged. Only defendant handled and settled all claims.

Those whose goods were carried were charged and in fact paid in accordance with defendant's effective tariffs specifying rate from the points of origin to the points of destination. All shipments were handled as through movements.

No one, neither plaintiff, nor defendant, nor any shipper or consignee ever referred to a combination rate, or in any way acted as though it regarded plaintiff as performing as a common carrier in the operations now under review.

In December 1963 the ICC's representative notified plaintiff it was not collecting proper charges in accordance with the agency tariffs of the New England Motor Rate Bureau, Inc.

Plaintiff and defendant conferred but reached no agreement. Plaintiff thereupon brought this action.

November 29, 1966 this Court ordered the parties to seek a ruling from the ICC as to the tariffs properly applicable. In this connection the Court requested the ICC to make the following four assumptions:

"1. That there was an oral agreement or a novation of a written agreement under which Locust Cartage Co., Inc., agreed to carry for Transamerican Freight Lines, Inc., goods which were covered by shipping contracts between Transamerican Freight Lines., Inc., and its customers.

2. That the actual carriage was within the points to which Transamerican Freight Lines., Inc., was authorized by the ICC to carry goods.

3. That the shipper paid to Transamerican Freight Lines, Inc., precisely the amount that was appropriate if the total carriage was by Transamerican Freight Lines, Inc.

4. That Transamerican Freight Lines, Inc., did not have complete control of the operation of Locust Cartage Company, Inc."

The ICC found that because plaintiff used its own equipment, employed its own drivers, routed under its own operating authority, and intended to be an independent contractor, it was acting as a common carrier in the transportation here involved. There being no joint rate arrangement, the ICC concluded that a combination of the respective local rates, as published in each carrier's agency tariff, would apply. The ICC limited its findings and conclusions to those portions of the movements which occurred outside the commercial zone of Boston, and to the period between February 8, 1962, the date on which Ryan purchased the stock of All Mass. Service Inc., and October 14, 1962, when Locust became a participant in the agency tariffs of the Eastern Central Motor Carriers, Inc.

In reaching its findings and conclusions the ICC proceeded on the mistaken premise that this Court had assumed that plaintiff in the operations here involved was indeed acting as an independent carrier. But the fourth assumption, like the other assumptions, to which the Court referred in its November 20, 1968 order, falls far short of that point.

Moreover, the specific evidence before the Commission did not, on a fair consideration of all the factors, warrant any such finding or conclusion by the Commission.

The dominant facts before the Commission, like the dominant facts before this Court, point to a precisely opposite determination.

This traffic began in 1961 when defendant employed Ryan who had no status as a common carrier and who did not possess, or contemplate, or need any license from any public authority, local or national. Nothing more than pick-up and delivery was contemplated. It was to that relationship and arrangement that plaintiff succeeded. Plaintiff, as a successor to All Mass. Service Inc., had, to be sure, DPU and ICC authority to operate as a common carrier. But plaintiff did not need that authority or use it. Virtually all plaintiff's transportation was for defendant. It was defendant's own business in which plaintiff was giving a helping hand. The shippers whose commodities were transported got bills from, and paid them to, defendant. If they had claims the shippers made them to, and settled them with, defendant. No one, not the parties or any third persons, ever regarded the transportation as being a combination of the operations of two carriers.

It was the intent of both the parties that plaintiff as defendant's exclusive agent should perform services for defendant with respect to defendant's customers, at the published rates applicable to defendant's carriage within the areas and points covered by defendant's own licenses from public authorities. Plaintiff was a mere cartage operator. It was not acting as a common carrier, nor as a shipper, nor as a shipper-carrier, nor as an interline carrier.

The ICC's report cannot be followed. In any event, the report is only advisory. On the evidence before it, this Court rejects

the Commission's report, and substitutes this Court's own findings and conclusions that plaintiff at the relevant dates was operating not as a common carrier but merely as an independent contractor which was not a common carrier, and that the tariffs of the New England Motor Rate Bureau, Inc. did not apply to the relevant movements of goods.

There is no valid basis for plaintiff's claim.

Judgment for defendant with costs on Count one.

Charles E. Wyzanski, Jr.
Chief Judge

Appendix B

United States Court of Appeals
For the First Circuit

No. 7498.

LOCUST CARTAGE CO., INC.,
PLAINTIFF, APPELLANT,

v.

TRANSAMERICAN FREIGHT LINES, INC.,
DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
COFFIN, *Circuit Judge*, and FORD, *District Judge*.

Arthur E. Nicholson, with whom *Harold M. Linsky* and *Mary E. Kelley* were on brief, for appellant.
Stephen J. Paris, with whom *Alan G. Miller* was on brief, for appellee.

August 3, 1970.

COFFIN, *Circuit Judge*. The Motor Carrier Act of 1935 forbids common carriers to engage in transportation without filing a tariff, 49 U.S.C. § 317(d), and obliges such carriers to charge their published rates "for transportation or for any service in connection therewith". 49 U.S.C. § 317(b). Relying on these provisions, appellant Locust Cartage Co., Inc. brought suit in a Massachusetts state court against appellee Transamerican Freight Lines, Inc., seeking to recover the difference between Locust's published rates and the rates it charged Transamerican over a two year period. Transamerican immediately removed to federal district court on the grounds of diversity. After a tortuous procedural history, which consumed four years

and included both informal and formal opinions from the Interstate Commerce Commission, the case is here on appeal from a final judgment against Locust.

Both parties are common carriers by motor vehicle operating under certificates of convenience and necessity issued by the I.C.C.[1] Their dispute stems from a contract which Transamerican entered with one Paul C. Ryan in 1961. At that time, Transamerican, a carrier with extensive interstate operations, was experiencing difficulty in the operations of its Boston terminal. Ryan agreed to take over dock handling at the terminal and to perform pick up and delivery service between the terminal and other points in Massachusetts, both within and without the Boston commercial zone as defined in 49 C.F.R. § 1048.9. Under the terms of the contract, Transamerican issued all shipping documents and dealt with the public, while Ryan employed the drivers and controlled the physical details of the service. Since Ryan possessed neither state nor federal operating authority, he purported to lease his equipment to Transamerican, which obtained appropriate licenses for the vehicles in its own name.

Operations continued under this arrangement until February 1962, when Ryan purchased the stock of All Mass. Services, Inc., a common carrier authorized to provide service within Massachusetts. After changing the corporate name to Locust Cartage Co., Inc., Ryan caused the company to obtain new licenses for his vehicles and to file a notice with the I.C.C. adopting the tariffs of All Mass. Services. However, in spite of these indications that Locust

[1] Locust is authorized to transport general commodities within Massachusetts under a certificate issued by the Massachusetts Department of Public Utilities and registered with the I.C.C. pursuant to 49 U.S.C. § 306(a)(1). Transamerican transports general commodities between points in a number of states under an I.C.C. certificate, and also possesses irregular route authority from the Massachusetts DPU.

intended to operate as a common carrier, Locust continued to perform pick up and delivery service for Transamerican and to charge Transamerican a rate other than the applicable tariff until late 1963, when I.C.C. investigators informed Locust that this practice was illegal. After extensive negotiations among Locust, Transamerican, and representatives of the Commission, Locust rectified its error by filing a concurrence in Transamerican's tariffs, effective as of October 1964.[2] Shortly thereafter, Locust filed suit to recover the difference between its tariffs and the rate it charged Transamerican from its date of birth in February 1962 to the date of its concurrence in October 1964.

In the district court, argument focused primarily on whether Locust's tariffs applied to the services which it performed for Transamerican. This issue, in turn, depended on whether the services in question were "transportation" within the meaning of 49 U.S.C. § 317(b) or a mere cartage operation. The district court initially directed the parties to seek an advisory opinion from the I.C.C. concerning whether Locust's published rates applied on the basis of several assumptions, the most important of which was that Transamerican did not exercise complete control over Locust's operations.[3] When an informal

[2] 49 U.S.C. § 316(e) permits carriers to establish joint rates. This is usually accomplished by having one carrier concur in the rates of the other pursuant to 49 C.F.R. § 1307.47.

[3] The court order read, in relevant part:

"Both parties will seek to secure an informal or, if possible, a formal ruling from the ICC as to whether in its opinion the agency tariffs of New England Motor Rate Bureau, Inc. would apply to the carriage of Locust Cartage Company, Inc. upon the following assumptions.

"The first assumption is that there was an oral agreement or a novation of a written agreement under which Locust Cartage Company, Inc. agreed to carry for Transamerican Freight Lines, Inc. goods which were covered by shipping contracts between Transamerican Freight Lines, Inc. and its customers.

"The second assumption is that the actual carriage was within the points that Transamerican Freight Lines, Inc. was authorized by the ICC to carry goods.

opinion of the I.C.C. staff upheld Locust's claim, Transamerican moved to stay proceedings on the grounds that the issue of the applicable rate fell within the primary jurisdiction of the I.C.C. The district court then ordered Transamerican to initiate proceedings for a declaratory order before the Commission. Both parties submitted arguments and extensive affidavits to the Commission. On the basis of these affidavits, the I.C.C. trial examiner concluded that Locust's operations exhibited the characteristics of a common carrier rather than those of a mere cartage operator, and that Locust was therefore bound to charge its published rate for services outside the commercial zone of Boston.[4] Division 2 of the Commission affirmed. 335 I.C.C. 46 (1969). However, the district court, relying on substantially the same evidence, concluded that Ryan and Transamerican intended no more than a cartage operation, and that subsequent developments did not alter their basic arrangement. The court therefore entered judgment against Locust.

I.

An initial question we must confront is whether the district court properly substituted its own findings of fact and conclusions of law for those of the I.C.C. This question, in our view, turns on two separate issues: first, whether the issue of Locust's duty to charge its published

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"The third assumption is that the shipper paid to Transamerican Freight Lines, Inc. precisely the amount that was appropriate if the total carriage was by Transamerican Freight Lines, Inc.

"The fourth assumption is that Transamerican Freight Lines, Inc. did not have complete control of the operations of Locust Cartage Company, Inc. With respect to the fourth assumption, a more detailed statement may be made by the parties."

[4] 49 U.S.C. § 302(c)(2) provides that the provisions of the Motor Carrier Act shall not apply to pick up and delivery service performed for a common carrier within a terminal area—here the commercial zone of Boston. *See also* 49 C.F.R. § 1057.3(c) exempting operations within a commercial zone from the I.C.C.'s lease regulations.

rates fell within the special competence of the I.C.C.; and second, whether the I.C.C. has exercised its competence by drawing independent findings and conclusions from the record before it.

Turning to the first issue, we note that although Transamerican invoked the primary jurisdiction of the Commission in the court below, neither party has pressed the question on appeal. The doctrine of primary jurisdiction, however, does more than prescribe the timetable of a lawsuit; it also allocates the law-making function between court and agency. *United States* v. *Western Pacific R.R. Co.*, 352 U.S. 59, 65 (1956). The doctrine is, moreover, especially relevant in cases like this, where courts are confronted with issues of fact arising under a complex regulatory scheme outside their normal experience. *Far East Conference* v. *United States*, 342 U.S. 570, 574 (1952). We have, therefore, on our own motion considered whether the question of Locust's obligation to charge its published rate fell within the primary jurisdiction of the I.C.C. This, in turn, depends on "whether the question raises issues of transportation policy which ought to be considered by the Commission in the interests of a uniform and expert administration of the regulatory scheme laid down by the Act." *United States* v. *Western Pacific R.R. Co.*, 352 U.S. at 65.

Applying this standard, it is apparent that the question of Locust's obligation raises significant issues of transportation policy. Under 49 U.S.C. § 317(b), Locust's obligation to charge its published rates depends on whether Locust is performing "transportation . . . or any service in connection therewith." The term "transportation" plays a key role in the regulatory scheme created by the Motor Carrier Act. The Act defines this term comprehensively to include "all vehicles operated by, for, or in the interest of any motor carrier . . . together with all facili-

ties and property operated or controlled by any such carrier . . . and used in the transportation of passengers or property in interstate commerce . . . ." 49 U.S.C. § 303(19). Those who provide transportation for hire must possess either a certificate or a permit issued by the I.C.C. 49 U.S.C. § 303(c). Possession of operating authority requires a carrier to observe a variety of statutory obligations, including the obligation to charge published rates, whenever it performs any form of transportation. *See* 49 U.S.C. §§ 316, 317, 318. These provisions do not prevent one carrier from placing his equipment under the control of another under a lease or similar arrangement. In such cases, the user rather than the owner provides transportation within the meaning of the Act, *Cecil G. Dixon*, 21 M.C.C. 617 (1940), and the statute is enforced by treating the user as the operator of the equipment in question. *See, e.g.*, 49 C.F.R. § 1057 (I.C.C. regulations on lease and interchange of equipment). Thus the question of whether a carrier performs transportation has important consequences not only for the carrier itself, but also for the agency charged with enforcing the Act.

There is, however, no single touchstone for resolving this question. One important factor is whether a carrier has held himself out as performing an integrated transportation service. But it is common for traffic solicited and billed by one carrier to move over the lines of another under an interline arrangement, and it is settled that one common carrier can act as an agent for another without losing his status as carrier. *United States* v. *Brooklyn Eastern District Terminal*, 249 U.S. 296 (1919). Another significant factor is whether a carrier retains sufficient control over an operation to discharge a carrier's responsibilities to shippers and the general public, but this question requires a weighing of several considerations, including whether the carrier assumes responsibility for the

safety of equipment and control of daily operations. *See Boston & Maine Transportation Co.*, 34 M.C.C. 599, 610-613 (1942). These factors illustrate that whether a carrier performs transportation cannot be determined by a simple verbal formula, but requires consideration of a complex of facts in the light of the broad remedial purposes of the Act. *Compare United States* v. *Drum*, 368 U.S. 370, 375-376 (1962). Of course, courts could resolve these factual questions, but they could not provide the uniformity of resolution required by the regulatory scheme. We therefore conclude that the issue of whether Locust was obliged to charge its published rate under 49 U.S.C. § 317(b) fell within the primary jurisdiction of the I.C.C. *Cf. Agricultural Transportation Assoc. of Texas* v. *King*, 349 F.2d 873, 883-885 (5th Cir. 1965).[8]

This conclusion brings us to the second part of our problem: whether the I.C.C. in fact exercised the lawmaking powers reflected in the doctrine of primary jurisdiction. Since the Commission followed its normal procedure in a declaratory action, the answer would seem to be

[8] By this ruling we do not intend to encumber every carrier's suit for undercharges with a parallel administrative proceeding. The doctrine of primary jurisdiction is a flexible tool for the allocation of business between court and agency, and should seldom be invoked unless a factual question requires both expert consideration and uniformity of resolution. Thus no reference to the agency is necessary when the issue turns on questions of law which have not been committed to agency discretion, *e.g. Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485 (1947), or when agency policy has already been clearly enunciated, *e.g., Shaw* v. *Southland Corp.*, 370 F.2d 376, 379-380 (5th Cir. 1966), or when the issue turns on questions of fact which are peculiar to the case and have no broader implications for the I.C.C.'s regulatory program. *E.g., Pennsylvania R.R. Co.* v. *Fox & London*, 93 F.2d 669 (2d Cir. 1938). In this case, however, the question of whether Locust performed transportation raises broader issues of transportation policy requiring uniform agency resolution. Otherwise, Transamerican's identical relationships with two carriers in different terminal areas could produce diametrically opposed rulings on the appropriate tariff.

obvious. Transamerican, however, argues that the court, the parties, and the Commission itself contemplated that the Commission would merely offer an "advisory opinion" based on hypothetical circumstances posed by the court. Our examination of the record leads us to a contrary conclusion.

The issue of primary jurisdiction was first raised by Transamerican in October 1967, shortly before the case was scheduled for trial. We do not know why the district court failed to rule on the issue before requiring the delay and expense of a formal administrative proceeding. Nevertheless, the court's initial action in retaining jurisdiction and ordering Transamerican to seek a declaratory order were consistent with a formal reference to the I.C.C. under the doctrine of primary jurisdiction. *See, Elgin, Joliet & Eastern Rwy. Co.* v. *Benjamin Harris & Co.*, 245 F. Supp. 467, 469 (N.D. Ill. 1965); 3 K. Davis, *Administrative Law Treatise* § 19.07, at 42. The initial actions of the parties in submitting extensive affidavits to the Commission are also consistent with a formal reference to the agency. Moreover, the trial examiner obviously relied on these affidavits in reaching his ultimate conclusion concerning the applicable tariff. Two of the examiner's three ultimate findings cannot be deduced from the court's assumptions alone, and the third, concerning Transamerican's lack of control over Locust's operations, reflects the examiner's independent study of the evidence, as well as the court's assumptions.

At this point, however, an ambiguity appears in the record. In its exceptions to the examiner's report, Transamerican protested that the examiner erred in "[t]reating the issues as confined by the assumptions of fact set forth in the Court's order . . . ." Answering this objection, Division 2 of the Commission stated:

"The function of this Commission in this proceed-

ing is to render administrative aid to the court. Therefore, the examiner was correct in confining his consideration of the issues to those reflecting the court's assumptions." 335 I.C.C. at 50.

Both Transamerican and the district court read this statement to mean that the Commission made no independent findings, but relied entirely on the court's assumptions. But the statement can also be read as an accurate description of the limited administrative role in cases which raise both broad issues of regulatory policy and specific questions of contractual liability. *See, e.g., Thomson, Trustee* v. *Texas Mexican Railway System*, 328 U.S. 134 (1946). The latter reading seems preferable. We doubt whether the Commission would have decided a significant issue of transportation law—and published its opinion—on the basis of a purely hypothetical situation. More probably, the Commission confined itself to the issues posed by the court's assumptions, but relied on the trial examiner's findings of fact. We conclude, therefore, that the Commission's declaratory order was not merely advisory, but reflected the Commission's considered opinion of an issue within its primary jurisdiction.

Given this premise, we think the district court erred in substituting its own findings and conclusion for those of the Commission. When the Commission resolves a question within its primary jurisdiction, its resolution should not be set aside unless it exceeds the Commission's statutory authority or is unsupported by substantial evidence. *Illinois Central R.R.* v. *Norfolk & Western Ry.*, 385 U.S. 57, 69 (1966); *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 619-621 (1966); *Keller Industries* v. *United States*, 311 F. Supp. 384, 387 (N.D. Fla. 1970). Moreover, when a district court refers an issue to the I.C.C., a party aggrieved by the I.C.C.'s order must file an action for review within 90 days. 28 U.S.C. § 1336(c); *cf.*

McClean Trucking v. *United States*, 387 F.2d 657, 659-660 (Ct. Cl. 1967). No such action was filed in this case within the time allotted. Thus the decision of the I.C.C. on the issue of Locust's obligation to charge its published rates became final and binding on the district court. *Elgin, Joliet & Eastern Rwy.* v. *Benjamin Harris & Co.*, 245 F. Supp. at 471-472.

II.

We recognize that our conclusion concerning the binding effect of the I.C.C.'s order may seem harsh. Transamerican's failure to seek review may be attributed to honest confusion arising from ambiguities in the Commission's opinion. Were we convinced that the Commission's opinion was an insufficient basis for liability, we might remand for further proceedings before the I.C.C. On the other hand, this lawsuit has already been prolonged by several years because of Transamerican's insistence on obtaining the I.C.C. order whose consequences it now seeks to escape. Moreover, our own examination of the record convinces us that there was warrant in the law and a rational basis for the Commission's decision.

The evidence before the Commission, while conflicting, supports its conclusion that Locust's operations exhibited the independence characteristic of a carrier performing transportation services. Transamerican emphasizes that all the shipments in question travelled on Transamerican's bills of lading, that Transamerican did all billing and collecting, and that Transamerican satisfied all damage claims. Moreover, the parties have stipulated that the rates charged shippers were based on Transamerican's tariffs from point of origin to point of destination, with no separate charge stated for the portion of the service performed by Locust. However, the I.C.C. hearing examiner found that Locust controlled the handling and routing of all shipments between the Boston terminal and

points within Massachusetts. In addition, all drivers were employed by Locust, and Locust performed the required safety inspections of all equipment used in its portion of the service, including Transamerican trailers. Locust also carried its own meager business on the same trucks as Transamerican's freight. Finally, as the hearing examiner emphasized, the lease of Ryan's equipment to Transamerican was terminated as soon as Locust received operating authority from the I.C.C. Transamerican challenges this final conclusion, but it seems clear to us that the lease was primarily a device for putting Ryan's equipment on the road and had no further effect between the parties as soon as Locust obtained its own authority. These findings justify the I.C.C.'s conclusion that Locust did not transfer the exclusive use of its vehicles to Transamerican, but continued to exercise the kind of control characteristic of a motor carrier exercising its own authority. *See Boston & Maine Transportation Co., supra* at 611-613.

Transamerican attacks this conclusion as based on an erroneous legal standard. The correct criterion, in Transamerican's view, is not whether it lacked physical control of Locust's operations, but whether Locust's operations were part of a single complete freight service which Transamerican held out to the public. For this proposition Transamerican cites *United States v. N.E. Rosenblum Truck Lines, Inc.*, 315 U.S. 50 (1942) and *Thomson, Trustee v. United States*, 321 U.S. 19 (1943). Both *Thomson* and *Rosenblum* involved applications for "grandfather" operating rights by carriers who had relied on independent contractors to provide their services. In each case, the I.C.C. awarded operating rights to the independent contractors rather than to the carrier who offered the service to the public. The Supreme Court rejected these rulings on the grounds that Congress, in providing for grandfather rights, did not intend to create multiple operating rights

on the basis of a single integrated transportation service. *United States* v. *Rosenblum Truck Lines, supra* at 53, 54; *Thomson* v. *United States, supra*, at 24.

These cases do not, however, involve a total repudiation of the I.C.C.'s "control and responsibility" test. *See Thomson* v. *United States, supra* at 26. We agree with the Commission that control over daily operations is still a relevant factor in determining whether a truck owner performs transportation services. *See Riss & Co., Inc.*, 48 M.C.C. 327, 353-360 (1948). We think the "control and responsibility" test may properly be made determinative when the issue is not which of several carriers is entitled to operating rights, but whether a carrier who has already secured such rights must abide by his statutory obligation to charge rates fixed by his tariffs. If *Rosenblum* and *Thomson* could be used to cloak the operations of two already certified carriers, then many of the I.C.C.'s detailed regulations of tariffs, joint rates, and leasing arrangements could be defeated by private agreement. We conclude, therefore, that the Commission was within its statutory authority.

III.

There remains for consideration Transamerican's claim that even if Locust was a common carrier, it should be estopped from recovering more than its agreed charge from another carrier. Transamerican concedes, as it must, that a carrier can recover undercharges from a shipper regardless of contrary agreement, misquotation by the carrier, reliance, or other equitable defense. *Louisville & Nashville R.R. Co.* v. *Maxwell*, 237 U.S. 94 (1915); *Pittsburgh, Cincinnati, Chicago & St. Louis Rwy. Co.* v. *Fink*, 250 U.S. 577 (1919). But Transamerican insists on the distinction between carriers and shippers. When a carrier charges a shipper less than its published rate, it confers an immediate economic advantage over other shippers

similarly situated. Thus carriers cannot be permitted to vary their tariffs by agreement with individual shippers. Carriers are, however, encouraged to agree among themselves about joint rates. 49 U.S.C. § 316(c). Indeed, the agreed rate in this case would have been legal had Locust simply filed a concurrence. In these circumstances, Transamerican maintains, Locust should be estopped from recovering more than its agreed charge.

A similar argument was made and rejected in *Bowser & Campbell* v. *Knox Glass, Inc.*, 390 F.2d 193 (3d Cir.), *cert. denied*, 392 U.S. 907 (1968), a case involving the efforts of a contract carrier to recover undercharges from a shipper. Contract carriers, unlike common carriers, are free to negotiate their rates with individual shippers so long as the resulting tariffs are filed. The carrier in *Bowser & Campbell* neglected to file an agreed rate which was substantially below its published rates. The court admitted that this oversight caused no harmful discrimination among shippers, but nevertheless permitted the carrier to recover. The duty to abide by published tariffs, in the court's view, served to discourage not only unjust discrimination against shippers, but also destructive competition among carriers. 390 F.2d at 195-197.

We find this reasoning compelling and applicable to our case. Published tariffs play a central role in expediting the I.C.C.'s rate regulation and in insuring the economic stability of the trucking industry. Even though joint rates are the product of bargaining between carriers, the obligation to publish and abide by these rates prevents the kind of fluid, ad hoc ratemaking which endangers efficient service. *Cf. American Trucking Association* v. *United States*, 344 U.S. 298, 305-306 (1953). Moreover, once carriers have agreed to file a joint rate, the Commission has the power to supervise their relationship and to establish a just division of fares between them. 49 U.S.C.

§ 316(f). Finally, published tariffs serve an important notice function for the Commission and other interested parties, *compare, e.g., Great Western Packers Express, Inc.* v. *United States*, 246 F. Supp. 151 (D. Colo. 1965), a function which would be seriously jeopardized if carriers could readily enforce unpublished rates among themselves. It is for these reasons, we think, that the statute obliges carriers to collect their published tariffs from all who use their services, not merely from shippers. 49 U.S.C. § 317(b); *see ICC* v. *North Pier Terminal Co.*, 164 F.2d 640 (7th Cir. 1947), *cert. denied*, 334 U.S. 815 (1948). This obligation is best enforced by treating one carrier as legally obliged to collect and the other to pay the published tariffs regardless of contrary agreement. *Cf. Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520, 521 (1939); *Baldwin* v. *Scott County Milling Co.*, 307 U.S. 478, 484, 485 (1939).

We therefore hold that Locust was legally obliged to collect its published rates for services performed outside the terminal zone of Boston between February 1962 and October 1964, and that it is not estopped from collecting its full rate because of its agreement with Transamerican to accept a lesser sum. We express no opinion on the issue of damages.

Reversed and remanded for proceedings not inconsistent with this opinion.

Appendix C

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Civil Action
No. 65-144-W

WYZANSKI, Ch.J.

PAUL V. RYAN and
LOCUST CARTAGE CO., INC.

v.

TRANSAMERICAN FREIGHT LINES, INC.

APPEARANCES: Arthur E. Nicholson, Esquire, Attorney for the Plaintiff

Stephen Paris, Esquire, Attorney for the Defendant.

Court Room No. 6
Federal Building
Boston, Mass.
November 29, 1966

THE COURT. A pretrial conference was held today. Following it the Court makes the following orders and directions:

No. 1. All dates previously set for the filing of pleadings, briefs or other documents are canceled.

No. 2. Transamerican Freight Lines, Inc. will seek to discover within a month exactly which shipments covered by Count 1 were to points which were beyond the transportation authority enjoyed by Transamerican Freight Lines, Inc.

No. 3. Both parties will seek to secure an informal or, if possible, a formal ruling from the ICC as to whether in its opinion the agency tariffs of New England Motor Rate Bureau, Inc. would apply to the carriage of Locust Cartage Company, Inc. upon the following assumptions:

The first assumption is that there was an oral agreement or a novation of a written agreement under which Locust Cartage Company, Inc. agreed to carry for Transamerican Freight Lines, Inc. goods which were covered by shipping contracts between Transamerican Freight Lines, Inc. and its customers.

The second assumption is that the actual

carriage was within the points that Transamerican Freight Lines, Inc. was authorized by the ICC to carry goods.

The third assumption is that the shipper paid to Transamerican Freight Lines, Inc. precisely the amount that was appropriate if the total carriage was by Transamerican Freight Lines, Inc.

The fourth assumption is that Transamerican Freight Lines, Inc. did not have complete control of the operations of Locust Cartage Company, Inc. With respect to the fourth assumption, a more detailed statement may be made by the parties.

No. 4. After the ICC has rendered its formal or informal opinion, or declined to do so, the parties will file briefs in this court directed at the principal question of law raised under Count 1 as to whether if the facts are as alleged in the Complaint in Count 1 the plaintiff has stated a cause of action.

The plaintiff will amend Count 1 to make the date on which the period referred to in paragraph 2 of Count 1 begins February 8, 1962 instead of January 2, 1962. The defendant will answer the amended complaint within five days after that further amendment to the amended complaint is filed.

Appendix D

Interstate Commerce Commission
OFFICE OF THE SECRETARY
Washington, D.C. 20423

March 1, 1967

Honorable Charles E. Wyzanski, Jr.
Chief Judge
United States District Court for
the District of Massachusetts
Boston, Massachusetts 02108

Re: Locust Cartage Co., Inc. v.
Transamerican Freight Lines, Inc.

Dear Judge Wyzanski:

This is submitted in response to two letters to the Commission, dated September 30, 1966, and December 14, 1966, from Mr. Harold M. Linsky, attorney for the plaintiff in the above-described proceeding.

Involved is a claim by Locust Cartage Co., against Transamerican Freight Lines, Inc., for the difference between Locust's published tariff rates and the amount paid to it by Transamerican for transportation services performed by Locust between Medford, Massachusetts, and other points in Massachusetts beyond the Boston Commercial Zone. Mr. Linsky advises that the Court suggested that he seek an opinion from this Commission as to whether or not, on the facts as set forth in his letter, Locust should be allowed to recover the amount of its claim.

This letter represents the informal views of the Commission's staff, and is not a formal ruling of the Commission. It is based upon the following assumption, as stated in the pre-trial order of the Court:

(1) That there was an oral agreement or a novation of a written agreement under which Locust Cartage Company, Inc., agreed to carry for Transamerican Freight Lines, Inc., goods which were covered by shipping contracts between Transamerican Freight Lines, Inc. and its customers;

(2) That the actual carriage was within the points that Transamerican Freight Lines, Inc., was authorized by the ICC to carry goods;

Hon. Charles E. Wyzanski, Jr.

(3) That the shippers paid to Transamerican Freight Lines, Inc., precisely the amount that was appropriate if the total carriage was by Transamerican Freight Lines, Inc.; and

(4) That Transamerican Freight Lines, Inc., did not have complete control of the operations of Locust Cartage Company, Inc.

Except as above stated, this memorandum is based upon the facts as set forth in Mr. Linsky's letter of September 30, 1966, a copy of which is attached hereto.

The basic issue in this case concerns the compensation which Locust Cartage Co. was entitled to receive from Transamerican Freight Lines for transportation performed in interstate commerce within Massachusetts, in a joint movement with Transamerican. A contract between Locust and Transamerican provided for compensation in a lesser amount than that stated in Locust's tariffs filed with this Commission. During the period with which we are concerned, there were no joint rates between Locust and Transamerican.

Locust Cartage Company is a common carrier subject to the Interstate Commerce Act when handling interstate or foreign commerce, as evidenced by the fact that its intrastate certificate was registered with the Commission in MC-120477 (Sub-No. 1). As such, it is required by section 217(a) of the Act to file with the Commission tariffs showing all of its rates and charges for transportation in such commerce. It is also prohibited by Section 217(b) from charging, demanding, collecting or receiving a greater or less or different compensation for transportation or any service in connection therewith, than the rates and charges specified in the tariffs in effect at the time of shipment. This section further specifically prohibits Locust or any other carrier subject thereto from refunding or remitting in any manner or by any device, directly or indirectly, or through any agency or broker or otherwise, or extending to any person any privilege or facility for transportation in interstate or foreign commerce, except such as are specified in its tariffs. The only exceptions mentioned in section 217(b) are those pertaining to free or reduced transportation set forth in sections 1(7) and 22 of the Act, which are not involved here.

Joint rates are authorized by section 216(c) of the Act, which permits motor carriers to establish reasonable through

routes and joint rates with other such carriers or with common carriers by railroad, express and/or water. Divisions of joint rates are also authorized by the same section, and a carrier may accept a division of a joint rate which is less than its local rate (a rate that applies over the line of one carrier only). Locust and Transamerican, however, did not maintain joint rates on this traffic prior to October 16, 1964. Each was, therefore, required to charge its local rates on file with the Commission for interstate transportation within, to and from Massachusetts.

Locust, however, was apparently compensated for its services by Transamerican on the basis of the charges (lower than those set out in Locust's tariff) set forth in the agreement between them dated December 26, 1961, as amended, and designated as Exhibit 1 to Mr. Linsky's letter. This agreement purports to make Locust a "contractor" for Transamerican in the pickup, delivery, transfer and drayage of traffic for Transamerican in the City of Boston and its environs and is appropriately designated for that purpose as a "Contract For Pick-up and Delivery Service at Boston, Massachusetts." The agreement, however, appears actually to cover service outside the Boston terminal area and to embrace line-haul service by Locust.

Insofar as service within the Boston Commercial Zone is concerned, there appears to be no question but that Locust may perform the service for Transamerican on a contract basis. Section 202(c)(2) of the Interstate Commerce Act, 49 U.S.C. §302(c)(2), provides that Part II of the Act will not apply, except as to qualifications and maximum hours of service of employees and safety of operations:

> To transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for * * * a motor carrier subject to this part, * * * in the performance within terminal areas of transfer, collection or delivery service; but such transportation shall be considered to be performed by such carrier * * * as part of, and shall be regulated in the same manner as, the transportation by * * * motor vehicle * * * to which such services are incidental. (Emphasis supplied)

Locust was, therefore, exempt from the requirements of the Act with respect to the terminal services it performed for Transamerican, and Locust was not required to file or observe tariff rates and charges for service within the Boston Commercial Zone.[1]

[1]The Commission has held that the terminal areas of motor carriers are coextensive with the Commercial Zone.

To the extent, however, that Locust performed line-haul service outside the Boston Commercial Zone, it was required by section 217 to collect charges solely on the basis of tariffs filed with the Commission and in effect at the time the transportation took place. Locust was prohibited from accepting compensation on any other basis. However, to the extent that the agreement purported to compensate Locust on other than a tariff basis, it would be inconsistent with the Interstate Commerce Act and presumably was unlawful, null and void.

It is our informal view that, since Transamerican and Locust, two common carriers subject to the Act, maintained no joint rates, as to transportation performed by Locust from and to points in Massachusetts outside the Commercial Zone of Boston, Locust was lawfully entitled to and by law was required to collect its rates and charges in accordance with its tariffs on file with this Commission. On such traffic delivered by Transamerican to Locust (or received by Transamerican from Locust), the applicable rates were combinations of rates consisting of those of Transamerican to or from the point of interchange (Medford or Boston, Mass.), plus Locust's local rates from or to the point of interchange.

Dealing with the right of Locust to recover damages from Transamerican, Transamerican's liability is not entirely clear. Where Transamerican collected the charges from the consignee, it was obligated by law to collect the proper charges under the tariffs, which in this instance should have been based on combination rates. To the extent that it failed to do so, it is our opinion that it was liable to Locust for Locust's local charges.

Where the charges were collected by Locust, Locust was likewise obligated to collect the proper charges on a combination basis. It is not clear that Transamerican, in such cases, would be liable to Locust for its local charges. Locust should itself have collected any additional charges required to comply with the filed tariffs, from the consignee on collect shipments or the shipper on prepaid shipments, and failure to do so constituted a violation of the Interstate Commerce Act. Transamerican's liability, if any, would appear to arise only from the contract between the parties, which seems to preclude Locust from collecting its local charges. In our view, the effect of the contract on Transamerican's liability in the case of charges collected by Locust is basically a matter of contract law, for determination by the Courts, and we express no opinion as to this phase of the litigation.

I must again caution that this is an informal opinion of the Commission's staff, and is not binding on the Commission.

Sincerely yours,

H. Neil Garson

H. Neil Garson
Secretary

Enclosure

cc: Mr. Harold M. Linsky, Attorney
10 Tremont Street
Boston, Massachusetts 02108

Mr. Alan G. Miller, Attorney
Transamerican Freight Lines, Inc.
92 State Street
Boston, Massachusetts 02109

Appendix E

INTERSTATE COMMERCE COMMISSION

Served October 29, 1968

No. 34901

TRANSAMERICAN FREIGHT LINES, INC.
PETITION FOR DECLARATORY ORDER

Decided

Declaratory determination made that tariffs of the New England Motor Rate Bureau, Inc., publishing agent for Locust Cartage Company, Inc., apply to the involved movements insofar as they are interlined with Transamerican Freight Lines, Inc. Proceeding discontinued.

A. Alvis Lane for petitioner.
Arthur E. Nicholson for respondent.

REPORT AND ORDER

RECOMMENDED BY EARL S. DOWELL, HEARING EXAMINER

By order dated November 29, 1966, the United States District Court for the District of Massachusetts ordered that the parties to Civil Action No. 65-144-W, Paul C. Ryan and Locust Cartage Co., Inc. v. Transamerican Freight Lines, Inc., seek a ruling from this Commission as to the applicable tariffs covering the involved movements. Such determination is to be based on certain assumptions hereinafter enumerated.

By petition filed October 23, 1967, Transamerican Freight Lines, Inc., hereinafter called Transamerican or petitioner, seeks an order declaring that the agency tariffs of the Eastern Central Motor Carriers Association, Inc., agent for petitioner, are the only schedules applicable to the involved movements. Locust Cartage Co., Inc., hereinafter called Locust or respondent, filed its reply to the petition on November 13, 1967. The modified procedure was followed and the parties timely filed their statements of facts and arguments.

On May 17, 1968, the respondent filed a motion to strike certain portions of the petitioner's reply statement dated

[illegible] petitioner replies to [illegible] June 5, 1963. First, petitioner seeks to strike [illegible] of the statement which attempts to define the ultimate issue in this proceeding. Next, it seeks to strike portions of the statement dealing with the intent of the parties to this proceeding. The pleading, portions of which the respondent seeks to strike, is merely rebuttal argument, and it was not submitted as a statement of facts. Therefore, the subject items will be accorded the same weight as any other argument. The motion to strike is denied. Although one factor for consideration by this Commission is whether the relationship of Transamerican to Locust was that of striper to carrier, it is by no means the only factor. The determination of the applicable tariffs depends on a number of factors considered together in the light of the entire record.

In December, 1961, Paul C. Ryan, d/b/a Locust Cartage Company, without authority to engage in the carriage of goods from either this Commission or from the State of Massachusetts entered into a contractual arrangement with Transamerican Freight Lines, Inc., to carry the latter's shipments from its Medford, Mass. terminal to various points within and without the commercial zone of Boston, Mass. Also, a lease arrangement was entered into under which Ryan, who had purchased equipment in relation to the contract, was to lease the equipment to Transamerican. Apparently, however, no payments were made under said lease. At this time, the licenses on the equipment were issued to Transamerican by the Massachusetts Department of Public Utilities, and the equipment was placarded with Transamerican's name. On February 8, 1962, after the Massachusetts Department of Public Utilities approved Ryan's purchase of 50 percent of the stock of All Mass. Service, Inc., which carrier was a party to the tariffs of the New England Motor Rate Bureau, Inc., its name was changed to Locust Cartage Company, Inc. Locust adopted all tariffs of All Mass. by notice MF-ICC No. 1, effective March 29, 1962. On May 5, 1962, Locust Cartage Company, Inc. was recorded with the Massachusetts Corporation Department.

Now that Locust was authorized as a common carrier, the lease arrangement between Ryan and Transamerican was terminated. The equipment was returned to Locust, and new licenses were issued by the Massachusetts Department of Public Utilities to Locust covering said equipment. Transamerican's placards were removed and replaced with those of Locust.

The point of interchange between Locust and Transamerican continued to be at Transamerican's Medford terminal. Locust maintained its office at that terminal and rented space from Transamerican for storing its equipment. The drivers were employed

by Locust, and Locust supervised the movements from the terminal to the destination points in Massachusetts.

The contract between Ryan and Transamerican provided for Ryan to be paid a certain amount based on the distance traveled from Medford to the destination points. Under the contract, the amount charged to Transamerican's shippers was that amount which was applicable under the tariffs of Transamerican's tariff publishing agent, Eastern Central Motor Carriers Association, Inc. There was no additional charge for Ryan's or Locust's portion of the movement. In fact, the tariffs of neither carrier reflected the participation of the other with regard to any of the movements.

By the referred to order of the Court, dated November 29, 1966, the Commission is requested to rule on the tariffs applicable to these movements, based on certain assumptions which are as follows:

1- That there was an oral agreement or a novation of a written agreement under which Locust Cartage Company, Inc. agreed to carry for Transamerican Freight Lines, Inc., goods which were covered by shipping contracts between Transamerican Freight Lines, Inc. and its customers.

2- That the actual carriage was within the points that Transamerican Freight Lines, Inc. was authorized by the ICC to carry goods.

3- That the shipper paid to Transamerican Freight Lines, Inc. precisely the amount that was appropriate if the total carriage was by Transamerican Freight Lines, Inc.

4- That Transamerican Freight Lines, Inc., did not have complete control of the operations of Locust Cartage Company, Inc.

There are several factors which lend credence to the proposition that Transamerican did control the operations of Locust. First, all billing and collecting was done by Transamerican on bills of lading in the latter's name. Furthermore, the damage claims were paid by Transamerican, although the agreement between the parties specified that Ryan was to indemnify Transamerican for any loss and damage occurring while the shipment was in the possession of Locust. Finally, all the rates were published solely for the account of Transamerican. However, as to the portions of the movements performed by Ryan and later by Locust, Transamerican exercised no control over the handling and routing of the shipments. All the drivers were in the employ of Ryan-Locust, and most of the

tractors were owned by Locust. Therefore, the examiner concludes that the Court is correct in assuming that Transamerican did not have complete control over the operations of Ryan-Locust. The purported leasing arrangement for equipment between the parties was canceled as soon as Locust received its operating authority from this Commission. This is another important factor indicating that from the time Ryan took control of All Mass. and adopted its tariffs, Ryan's operations (under the new name of Locust) were interstate common carriage in character and not mere cartage delivery under the control of another carrier.

The petitioner contends that the intent of the parties is a controlling factor in the determination of the applicable tariffs. While it is true that Ryan may have intended to perform solely cartage service for the petitioner at the time of the original making of the agreements, its actions subsequently negate this intention. Operating authorities granted by this Commission serve to notify the public that the carrier obtaining such authority holds itself out to the general public as a common carrier for hire, and is bound to demand or accept no compensation for its services other than published in its tariffs. Furthermore, the licensing and placarding of Locust's vehicles, and its subsequent solicitation of other business substantiates the finding that Locust did intend to operate as a common carrier for hire and not as the exclusive agent of Transamerican.

The respondent contends that Transamerican was its shipper and Locust was the carrier, and by that reasoning the tariffs of the New England Motor Rate Bureau, Inc., apply to the involved movements. The Commission has stated that a person cannot be both a common carrier and a shipper as to the same service. Cf. Movement of Highway Trailers by Rail, 293 I.C.C. 93. As the title indicates, however, this proposition refers to intermodal carriers and may, therefore, be distinguished from the instant situation. The general proposition remains valid, though. In order for a common carrier to serve the public in the best manner, it cannot delegate its common carrier duty to serve by taking the position of a shipper, absent a clear showing of the relative advantage to the public. The examiner concludes that Transamerican was not and could not be a shipper to Locust.

Having concluded that Locust was a common carrier subject to the mandates of the Interstate Commerce Act, that Transamerican was not a shipper, and that Locust was not the exclusive agent of Transamerican, the examiner finds that Locust and Transamerican engaged in interline movements from the time that Locust obtained its common carrier authority on March 29, 1962. This finding places the two carriers on an equal plane, and, therefore, the lawfully published tariffs of each carrier must apply to the

considered movements. The foregoing, however, is limited to those movements carried by Locust beyond the commercial zone of Boston, Mass. The result is that the local rates published by the New England Motor Rate Bureau, Inc., for the account of Locust apply for the period between March 29, 1962, and October 14, 1964, from Medford on movements to points outside the Boston commercial zone. The total line-haul charge would thus be a combination of the local rates of each participating carrier, absent the filing of concurrences in one or the other tariffs of the parties establishing a corresponding joint through rate from origin to destination The carriers herein may have voluntarily entered into a joint rate and through route arrangement, specifying rates to take precedence over their local rates. This arrangement, however, must be published in their tariffs. Without it, the only remaining lawful rates are the combination of local rates already published. Subsequently, on the indicated date of October 14, such joint rate publication was effected between them and the combination of locals no longer applied.

Without attempting to pass upon the validity of the agreement between the parties, and without any intention of usurping the function of the Court, the examiner further notes that the Commission has found that, as between the lawfully published tariffs of a carrier and any conflicting agreement, the former shall apply. Section 217(b) of the Interstate Commerce Act provides that no carrier may demand or accept any more or less than the rate lawfully published and on file with this Commission, nor may it give any rebate or reduction in that rate. Therefore, the examiner finds that the combinations of local rates published in the individual tariffs of Transamerican and of Locust apply to the considered movements for the indicated period.

ORDER

It is the ORDER of the examiner that the tariffs of the New England Motor Rate Bureau, Inc., agent for Locust Cartage Company, Inc., apply to those portions of the involved movements carried by Locust. These tariffs are, however, limited to that period of time during which Locust Cartage Company, Inc. was a party to said tariffs----March 29, 1962 to October 14, 1964 (and did not participate in corresponding joint through rates with Transamerican Freight Lines, Inc.) and further limited to those movements to points outside the commercial zone of Boston, Mass. Therefore, the resultant rates applicable to the involved movements would be combinations of the local rates of Transamerican Freight Lines, Inc., and Locust Cartage Company, Inc. from origin to destination with interchange at Medford, Mass.

It is the further ORDER of the examiner that in the absence of a stay or postponement by the Commission or the timely filing of exceptions, the effective date of this order shall be 30 days from the date of service thereof; and that this proceeding be, and it is hereby, discontinued.

By the Commission, Earl S. Dowell, Hearing Examiner.

Dated at Washington, D. C., this 11th day of October, 1968.

H. NEIL GARSON

Secretary

(SEAL)

Appendix F

Served May 7, 1969

INTERSTATE COMMERCE COMMISSION

No. 34001

TRANSAMERICAN FREIGHT LINES, INC.—PETITION FOR DECLARATORY ORDER

No. 34801

TRANSAMERICAN FREIGHT LINES, INC.—PETITION FOR DECLARATORY ORDER

Decided April 25, 1969

Declaratory determination made that tariffs of the New England Motor Rate Bureau, Inc., publishing agent for Locust Cartage Company, Inc., applied to certain movements insofar as they were interlined with Transamerican Freight Lines, Inc. Proceeding discontinued.

A. Alvis Layne, Kim D. Nunn, and Stephen J. Paris for petitioner.
Mary E. Kelley, Harold H. Linsky, and Arthur E. Nicholson for respondent.

REPORT OF THE COMMISSION

DIVISION 2, COMMISSIONERS WALRATH, BUSH, AND BURKE

BY DIVISION 2:

The modified procedure was followed. Exceptions to the hearing examiner's report and recommended order were filed by the parties. Exceptions and requested findings not specifically discussed nor reflected in our findings or conclusions have been considered and found not justified.

By order dated November 20, 1966, the United States District Court for the District of Massachusetts ordered that the parties to civil action No. 65-146-W, Paul J. Ryan and Locust Cartage Co., Inc. v. Transamerican Freight Lines, Inc., seek a ruling from this Commission as to the tariffs applicable on the movements of certain traffic. Such determination was to be based upon certain assumptions hereinafter enumerated.

By petition filed October 23, 1967, Transamerican Freight Lines, Inc., hereinafter called Transamerican or petitioner, seeks an order declaring that the agency tariffs of the Eastern Central Motor Carriers Association, Inc., in which petitioner is a participant, are the only schedules applicable to the involved movements. Locust Cartage Co., Inc., hereinafter called Locust or respondent, filed its reply to the petition on November 13, 1967.

The petitioner is a motor common carrier of general commodities in several States including the State of Massachusetts. It is authorized by that State to perform transportation services throughout the State. However, as to its interstate traffic, Transamerican serves Massachusetts through its Medford, Mass., terminal within the Boston, Mass., commercial zone. In December 1961, petitioner and Paul C. Ryan, doing business as Locust Cartage Company, executed an agreement under which the latter was to perform all pickup and delivery services between the Medford terminal and other points in the State, both within and without the commercial zone of Boston, Mass. Locust then had no operating authority. The service outside the commercial zone of Boston was to be performed under a separate lease-of-equipment arrangement between the parties. Traffic was handled in this manner from December 1961, the time of the execution of the agreement, to February 8, 1962. On the latter date, Paul C. Ryan purchased the corporate stock of All Mass. Service, Inc., a motor common carrier. Since Ryan was not a carrier and the purchase was for stock rather than of assets, no authorization for the purchase was required by this Commission under sections 5 or 212(b) of the act. The necessary approval from the Massachusetts Department of Public Utilities was obtained before consummation of the purchase. By adoption notice filed with this Commission, the corporate name was changed to Locust Cartage Company, Inc., effective March 29, 1962.

After acquiring its authority as a common carrier and terminating the lease arrangement between the parties, Locust resumed operation of its equipment which was reregistered with the State of Massachusetts in its name, and licenses were issued thereunder. Locust maintained its terminal at Transamerican's Medford facility for which it paid a monthly rent by agreement.

Upon notification by the Commission's Bureau of Enforcement that it was not collecting proper charges in accordance with the agency tariffs of the New England Motor Rate Bureau, Inc., Locust contacted Transamerican to attempt to settle the matter. When other recourse failed, Locust filed suit in the United States District Court for the District of Massachusetts for the difference between the amounts paid to Locust by Transamerican for the services rendered, and the amounts published in its schedules of local tariff rates. Among other things, Locust maintained that Transamerican stood in the place of a shipper with Locust as the carrier, and that the agreement of December 1961 was

made with Paul J. Ryan rather than with Locust Cartage Company, Inc.

As indicated, the court, on November 29, 1966, ordered that the parties seek from this Commission a ruling based upon the following assumptions:

1. That there was an oral agreement or a novation of a written agreement under which Locust Cartage Co., Inc., agreed to carry for Transamerican Freight Lines, Inc., goods which were covered by shipping contracts between Transamerican Freight Lines, Inc., and its customers.
2. That the actual carriage was within the points to which Transamerican Freight Lines, Inc., was authorized by the ICC to carry goods.
3. That the shipper paid to Transamerican Freight Lines, Inc., precisely the amount that was appropriate if the total carriage was by Transamerican Freight Lines, Inc.
4. That Transamerican Freight Lines, Inc., did not have complete control of the operation of Locust Cartage Company, Inc.

The court specifically directed that the ruling should determine the applicable tariffs for the movements handled by Locust for Transamerican.

Although the court assumed a lack of complete control by Transamerican, the parties submitted evidence and argument directed to this issue and the examiner found that the facts support such a finding. The examiner concluded that respondent's use of its own equipment and routing under its own authority, and the employment of its own drivers gave credence to the assumption that there was an independent operation by Locust. He further concluded that the intention of the parties was that Locust was to be an independent contractor, and that an exclusive agency was not contemplated. Thus, the actions of Locust in obtaining its operating authority as a common carrier were not inconsistent with its original intention.

The examiner also found that Transamerican could not be a shipper as to Locust, since a person cannot be both a shipper and a common carrier as to the same service. And finally, he found that the parties had engaged in interline movements with respect to the involved traffic for which, in the absence of any joint rate arrangements, a combination of the respective local rates would apply, as published in each carrier's agency tariff. The examiner limited his finding to those portions of the movements which occurred outside the commercial zone of Boston, Mass., and further limited his findings to the period between March 29, 1962, the date on which the tariffs of All Mass. Serv-

ice, Inc., were effectively adopted as the tariffs of Locust Cartage Company, Inc., and October 14, 1964, the date on which Locust became a participant in the agency tariffs of the Eastern Central Motor Carriers Association, Inc.

In its exceptions to the report and recommended order of the examiner, the respondent Locust alleges that the examiner erred in finding that March 29, 1962, was the date on which the tariffs of the New England Motor Rate Bureau, Inc., became effective for the involved movements. The respondent contends that the applicable date was February 8, 1962, when, after securing the necessary approval from the Massachusetts Department of Public Utilities, it acquired the corporation stock of All Mass. Service, Inc. The examiner selected the date of March 29, 1962, since that was the effective date on which the tariffs of All Mass. Service, Inc., were adopted by Locust Cartage Company, Inc.

We agree with the examiner that the tariffs of the New England Rate Bureau did not become effective for "Locust Cartage Company, Inc." until the adoption notice became effective on March 29, 1962. However, respondent is correct in its contention that the tariffs inure to the benefit of the new owner immediately upon purchase when the transaction is one which, as in the instant case, does not require the approval of the Commission under sections 5 or 212(b) of the act. Accordingly, the tariffs of the New England Motor Rate Bureau, Inc., would be applicable to the considered movements by Locust or its predecessor from the date of purchase on February 8, 1962.

In its exceptions to the examiner's report and recommended order, the petitioner Transamerican contends substantially as follows:

1. The examiner erred in confining the issues for determination to the assumptions contained in the court's order of November 29, 1966.
2. The examiner erred in failing to find that Locust acted for and on behalf of Transamerican rather than as a separate carrier.
3. The examiner erroneously concluded that the original intention of the parties governing their relationship had been abrogated by subsequent action.
4. The examiner erroneously found that Locust was a common carrier with respect to traffic handled in connection with Transamerican.

The petitioner contends that the assumptions, set forth above, contained in the court order of November 29, 1966, were directed to the parties rather than to the Commission. The petitioner

alleges that its petition is directed to all of the issues in the suit, and that the Commission's reliance on the assumptions of the court denies Transamerican its right to a "trial" of the disputed facts. The pertinent portion of the order reads as follows:

> No. 3. Both parties will seek to secure an informal or, if possible, a formal ruling from the ICC as to whether in its opinion the agency tariffs of New England Motor Rate Bureau, Inc., would apply to the carriage of Locust Cartage Company, Inc. *upon the following assumptions:* [Emphasis supplied]

There can be little doubt as to the meaning of the court's wording. To alter it in any way would usurp the function of the court as the ultimate trier of the facts. This can in no way be construed as a deprivation of the petitioner's right to a "trial." The court is providing that right. The function of this Commission in this proceeding is to render administrative aid to the court. Therefore, the examiner was correct in confining his consideration of the issues to those reflecting the court's assumptions.

On account of their past association and contractural relationship, Transamerican alleges that Locust was not a common carrier with respect to Transamerican, regardless of its public status otherwise. This implies that a carrier may avoid the requirements of the national transportation policy and the Interstate Commerce Act merely by entering into a contract for carriage with another carrier. The power of Congress to regulate commerce cannot be fettered by the maintenance of existing agreements which conflict therewith. The result would be to withdraw as much of the regulation of commerce from the control of Congress as private individuals arbitrarily choose. See *Colorado Interstate Gas Co.* v. *Federal Power Com'n.*, 142 F. 2d 943, 953 (1944), citing *Sproles* v. *Binford*, 286 U.S. 374, 390 (1932).

Petitioner claims that if Locust is determined to be a common carrier, it was required to collect its local charges, which it neglected to do, from the shippers on those shipments on which it collected for the account of Transamerican. We agree. The act specifically requires the collection of appropriate charges for the services rendered as published in the carrier's tariffs.

Where Transamerican collected the charges from the consignee, it was obligated to collect the proper charges based on the applicable combination rates. Where the charges were

collected by Locust, it was similarly obligated to collect the charges on a combination basis. Whether Locust was precluded from doing so by Transamerican, as urged by respondent, is a matter not within the purview of the issues submitted to us.

FINDING

We find that, as to the involved movements which took place outside the commercial zone of Boston, Mass., between February 8, 1962, and October 14, 1964, the date on which it joined the tariffs of the Eastern Central Motor Carriers Association, Inc., the tariffs of the New England Motor Rate Bureau, Inc., applied for those portions of the movements handled by Locust Cartage Co., Inc., a common carrier by motor vehicle, or its predecessor.

It is ordered, That this proceeding be, and it is hereby, discontinued.

By the Commission, division 2.

H. NEIL GARSON,
Secretary.

(SEAL)

335 I.C.C.

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF MASSACHUSETTS

Appendix G

LOCUST CARTAGE CO., INC.	
VS.	CIVIL ACTION No. 65-144-W
TRANSAMERICAN FREIGHT LINES, INC.	

STIPULATION

The instant case involves a claim by the plaintiff for alleged undercharges for certain service rendered by it for the defendant. By order of the court the defendant filed a petition on October 23, 1967, with the Interstate Commerce Commission seeking a hearing and a declaratory order under section 5 of the Administrative Procedure Act. The proceeding was accepted by the Commission under its modified procedure rules, wherein the evidence was submitted in the form of affidavits rather than through oral testimony of witnesses. In addition to other facts, both parties submitted evidence relating to the issue of control. In its decision the Interstate Commerce Commission took cognizance of the evidence submitted before it and certain assumptions as set forth in the court order of November 29, 1966. These assumptions are as follows:

1. That there was an oral agreement or a novation of a written agreement under which Locust Cartage Co., Inc. agreed to carry for Transamerican Freight Lines, Inc., goods which were covered by shipping contracts between Transamerican

Freight Lines, Inc., and its customers.

2. That the actual carriage was within the points to which Transamerican Freight Lines, Inc. was authorized by the ICC to carry goods.

3. That the shipper paid to Transamerican Freight Lines, Inc., precisely the amount that was appropriate if the total carriage was by Transamerican Freight Lines, Inc.

4. That Transamerican Freight Lines, Inc. did not have complete control of the operation of Locust Cartage Company, Inc.

Defendant still disputes assumption 1 and 4, although they will be assumed for the purpose of these motions for summary judgment.

Attached hereto and made a part of this record are the reports of the ICC and the affidavits submitted in the ICC proceedings. The affidavits consist of those affidavits of Paul C. Ryan, William J. Bates, Arthur E. Nicholson, George L. Kennedy, Russell Aborn, Nicholas Bulgaris, Henry Jurusz, John J. Duggan and Robert Julian submitted by the plaintiff, and those affidavits of William J. Sheehy (two), Daniel M. Power, Alfred A. Abelli, Joseph P. Churchill and Stephen J. Paris submitted by the defendant. These affidavits are lengthy and somewhat repetitive. However, there are facts contained in the affidavits about which there is no dispute and which, for the convenience of the Court and themselves, and for the purpose of these motions, the parties hereto stipulate to be as follows:

1. Transamerican is and was at all times pertinent hereto authorized under Certificates of Public Convenience and Necessity

issued by the ICC in MC-10761 and sub-numbers thereunder to transport general commodities, with certain exceptions, to, from, and between points in a number of states. Although the plaintiff considers it immaterial, Transamerican is and was at all times pertinent hereto authorized by the Department of Public Utilities of the Commonwealth of Massachusetts under Irregular Route Common Carrier Certificate Number 1089 to transport general commodities anywhere in the Commonwealth of Massachusetts, in intrastate commerce.

2. Plaintiff was organized on July 9, 1959, as a Massachusetts corporation under the name of All Mass. Service, Inc. Plaintiff's name was changed to its to its present name on February 8, 1962. On July 30, 1959, Plaintiff was authorized by the Department of Public Utilities of the Commonwealth of Massachusetts to transport general commodities anywhere in the Commonwealth of Massachusetts under Certificate of Public Convenience and Necessity Number 1198. On February 10, 1960, Plaintiff registered its intrastate certificate under the second proviso of Section 306(a)(1) of the Interstate Commerce Act which was assigned Docket No. MC-120477. Plaintiff, having complied with the "grandfather" provisions of Public Law 87-805 Stat. 911 (1962), was issued a Certificate of Registration in MC-120477 (Sub. No. 1) on January 21, 1964 by the Interstate Commerce Commission. On or about January 22, 1960, All Mass Service, Inc. became a party to the agency tariffs published by the New England Motor Rate Bureau, Inc. which tariffs were adopted by Locust to reflect the change in its name on March 29, 1962 in MF-ICC No. 1 filed with the ICC. On May 10, 1963, Locust was added to the participating carriers in the New England Motor Rate Bureau, Inc.'s

interstate classification and on June 11, 1963, All Mass Service, Inc. was cancelled from and Locust was added to the interstate class rate tariff of the New England Motor Rate Bureau, Inc. At all times pertinent hereto, the only published tariffs of Locust, whether interstate or intrastate, were those of the New England Motor Rate Bureau, Inc. its tariff agent. The tariffs of Locust wer applicable only on shipments moving to, from or between points in the Commonwealth of Massachusetts, being the only area it was authorized to serve as a motor carrier.

3. On or about December 26, 1961, Transamerican entered into a written agreement with on Paul C. Ryan, d/b/a Locust Cartage Co., whereby said Paul C. Ryan agreed, among other things, to accomplish all the dock handling at the Transamerican's Boston terminal and also to accomplish pickup and delivery service to and from Transamerican's Boston terminal and points both within and without the Boston Commercial Zone as defined in 49 C.F.R. § 170.9 on traffic having a prior or subsequent movement via Transamerican beyond Massachusetts. A copy of this agreement is attached hereto, made a part hereof, and marked Exhibit "A". Exhibit "A" was amended on September 24, 1962, October 28, 1963, and April 24, 1964, but these amendments were restricted to the schedule of rates and garage rent to be paid to Transamerican.

4. On or about September 2, 1964, Transamerican entered into a written agreement with Locust whereby Locust agreed, among other things, to accomplish all the dock handling at the Transamerican's Boston terminal and also to accomplish picup and delivery service to and from Transamerican's Boston terminal and points both within

and without the Boston Commercial Zone as defined in 49 C.F.R. § 170.9 on traffic having prior or subsequent movement over the lines of Transamerican beyond Massachusetts. A copy of this agreement is attached hereto, made a part hereof, and marked Exhibit "B".

5. All of the transportation involved was performed under bills of lading executed in the name of Transamerican and all receipts, waybills and other documents executed in connection with such transportation of freight were similarly executed in the name of Transamerican. Neither Paul C. Ryan nor Locust ever transported any of the involved freight under bills of lading naming either Paul C. Ryan or Locust as a carrier or naming Transamerican as a shipper.

6. All of the transportation involved consisted of commodities Transamerican was authorized to transport and was with few exceptions to or from points authorized to be served by Petitioner.

7. Practically all of the transportation involved was solicited from the general shipping public by Transamerican and all monies due from the shipping public for such transportation was billed and collected by Transamerican and not by Locust; and all claims of shippers and/or consignees for damage to the freight, whether such damage occurred while such freight was in the possession of Transamerican or Locust, were made to Transamerican and never to Locust. Although Locust has no knowledge, it does not dispute that such claims were paid by Transamerican.

8. Although Plaintiff has no knowledge, it does not dispute defendant's statement that the shippers and/or consignees were at all times charged and at all times paid in strict accordance with

Transamerican's effective tariffs specifying rates from the point of origin to the point of destination and all shipments were transported as a through movement from origin to destination shippers were never charged, nor did they ever agree to be charged, nor did they ever pay on the basis of a combination of local rates and/or any effective tariff of Locust.

9. At all times pertinent hereto, Locust's only place of business was Transamerican's Boston terminal and close to one hundred percent of Locust's business was comprised of the transportation involved herein. Rent was paid by Locust to Transamerican for the use of the garage facilities at such premises.

10. Transamerican made payment as provided in Exhibits "A" and "B" hereto for the services rendered with the exceptions of sums represented by checks which are the subject of Count III.

11. On April 16, 1963, Paul C. Ryan entered into an indenture with Transamerican. A copy of this indenture is attached hereto, made a part hereof, and marked "C".

12. A routine check by the local office of the ICC resulted in a letter dated December 18, 1963, addressed to Locust which is Exhibit "D" hereto. As a result, a meeting was held attended by all parties and the ICC representative. It was agreed that Locust would concur with Transamerican's tariff and by letter to the ICC dated February 21, 1964 (Exhibit "E"), Locust attempted to concur with the tariffs of Transamerican. On April 7, 1964, Locust attempted to concur with Transamerican's tariff by letter to Transamerican's tariff agent dated April 7, 1964 (Exhibit "F"). A concurrence was finally achieved effective October 15, 1964, and

there is no claim for any of the transportation after that date. The physical operations continued substantially the same after the concurrence.

13. That on January 4, 1965, Locust notified Transamerican in writing of its intention to terminate operations in accordance with a provision of Exhibit "E" and that, on January 28, 1965, Locust terminated operations under Exhibit "E".

14. Plaintiff submitted as an exhibit in this proceeding and the ICC proceeding a summary of the shipments transported by it beyond the Boston, Mass. Commercial Zone setting forth, in addition to other information, the sums paid by Transamerican, the alleged applicable rates contained in the tariffs of the New England Motor Rate Bureau, Inc. and the difference between such sums, the total of which is $135,384.64

LOCUST CARTAGE CO., INC.

By: Arthur E. Nicholson

TRANSAMERICAN FREIGHT LINES, INC.

By: Alan G. Miller

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In the
Supreme Court of the United States

OCTOBER TERM, 1970

No. 742

TRANSAMERICAN FREIGHT LINES, INC.,
PETITIONER,

v.

LOCUST CARTAGE CO., INC.,
RESPONDENT.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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RESPONDENT.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

Questions Presented

1. May Petitioner claim a denial of due process of law, despite the fact that the Commission's[1] Declaratory determination was made on the basis of evidence and argument by the parties and in the light of Petitioner's exception to the recommended report, and Petitioner did not

[1] Interstate Commerce Commission.

avail itself of the opportunity provided by Rule 53 of the Commission's General Rules of Practice to request an oral hearing or cross-examination of the witnesses, or the opportunity provided by Rules 101 and 102 of said General Rules of Practice to seek reconsideration of the report, or the right provided by the Administrative Procedure Act (5 U.S.C. Section 702) to seek judicial review?

2. Could it rationally be said that the Court of Appeals usurped the function of the District Court as the ultimate finder of facts in concluding that the issue as to Respondent's legal obligation to charge its published rates fell within the primary jurisdiction of the Commission to determine, and that the Commission having resolved the issue, it was error for the District Court to disregard such findings and to substitute its own findings and conclusions for those of the Commission in an area within the Commission's primary jurisdiction?

3. Can the application by the Court of Appeals of the doctrine of primary jurisdiction and its upholding thereunder of the Commission's findings and conclusions be defeated by the interposition of the doctrines of estoppel and *pari delicto*?

4. Does the decision of the Court of Appeals conflict with the decision of another court or this Court, or depart so far from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's power of supervision or otherwise raise a question of fundamental importance as to require a decision by this Court?

Statutes and Rules of Court Involved

Relevant portions of 5 U.S.C. Sections 554, 706; 28 U.S.C. 1336; 49 U.S.C. 316, 317; Interstate Commerce Commission General Rules of Practice, Rules 53, 101 and 102; Supreme Court Rules, Rule 56(4) are printed in Appendix A hereto.

Statement of the Case

In accordance with Rule 40(3) of the Rules of the Supreme Court of the United States, Respondent makes no statement of the case other than the following which it deems necessary to correct inaccuracies or omissions in the Petitioner's Statement:

Respondent's complaint in this proceeding, in accordance with the provisions of Title 49 U.S.C. Sections 316(b) and 317, seeks recovery of the difference between the amount due under its tariffs filed with the Interstate Commerce Commission as published by the New England Motor Rate Bureau, Inc., agent, and the amount paid it by the Petitioner.

On November 29, 1966 the District Court ordered (Petitioner's Brief, Appendix C, Page 40)

> "Both parties will seek to secure an informal or if possible, a formal ruling from the Interstate Commerce Commission as to whether in its opinion the agency tariffs of New England Motor Rate Bureau, Inc. would apply to the carriage of Locust Cartage Company, Inc. upon the following assumptions:"
> (For full text see Petitioner's Brief, Appendix C, pages 42, 43).

The fourth assumption appearing on Page 4 of the Petitioner's Brief as a quote from the full order of the Court fails to include the full text of the assumption as follows:

> "The fourth assumption is that Transamerican Freight Lines, Inc. did not have complete control of the operations of Locust Cartage Company, Inc. *With respect to the fourth assumption, a more detailed statement may be made by the parties.*" (emphasis supplied.)

On December 14, 1966 in compliance with the court order, Locust sought a ruling from the Commission. By letter dated March 1, 1967 (Petitioner's Brief, Appendix D, page 45) the Commission submitted to the District Court an informal opinion predicated upon the assumptions enunciated in the District Court order.

When the matter was called for trial in October of 1967 the District Court granted Transamerican's motion to stay action in that Court, which motion stated, in part,

> "... that there are certain underlying factual issues which are determinative of the rights of the parties to this action which are within the primary jurisdiction of and/or must properly be resolved by the Interstate Commerce Commission."
> (Respondent's Brief, Appendix B, p. 29).

The Court ordered Transamerican to file a petition for declaratory order before the Interstate Commerce Commission. The Commission accepted the petition and ordered the matter for handling under its Rules for Modified Procedure. The parties accepted the Commission's order, made no request for cross-examination or other oral hearing and issue was joined. Both parties submitted arguments and extensive affidavits to the Commission. On the basis of these affidavits the Interstate Commerce Commission trial examiner concluded that Locust's operations exhibited the characteristics of a common carrier rather than those of a mere cartage operator and that Locust was therefore bound to charge its published tariff for services outside the commercial zone of Boston. Division 2 of the Commission affirmed, 355 I.C.C. 46 (1969). No action for review was filed in this case within the time allotted. 28 U.S.C. Section 1336(c).

Approximately six months after the completion of the

Commission's proceedings both parties filed motions for summary judgment in accordance with Rule 56 of the Federal Rules of Civil Procedure on Count One only of Locust's complaint. For the convenience of the Court, the parties and the purpose of the motions for summary judgment, the parties stipulated as to certain facts contained in the evidence previously submitted to the Commission, all of which, attached to and made part of the stipulation, were before the Court.

The District Court granted judgment for Transamerican on Count One of the complaint (Petitioner's Appendix A p. 21). The District Court rejected the Commission's findings on the evidence submitted to the Commission, the Court stating that the Commission's report was merely advisory and that the Commission had proceeded on the mistaken premise that the District Court assumed Locust had been acting as an independent carrier (Petitioner's Appendix A, pages 24-26). Locust appealed to the Court of Appeals for the First Circuit which reversed the District Court and held that the decision of the Interstate Commerce Commission on the issue of Locust's obligation to charge its published rates became final and binding on the District Court. (Petitioner's Brief, Appendix B, page 36).

Argument

I. The Petitioner Was Not Denied Due Process of Law.

The Respondent respectfully submits that the "Questions Presented for Review" by the Petitioner in its brief are not expressed in the terms and circumstances of the case as required by Rule 40 (d)(1) of the Rules of the Supreme Court of the United States and Respondent has therefore restated the substance of those questions using as a basis the facts as found.

The Petitioner was neither denied due process nor entitled to a trial de novo after:

a. Invoking the primary jurisdiction of the Interstate Commerce Commission in an action pending in the District Court;
b. Petitioning the Interstate Commerce Commission for a hearing and declaratory order under 5 U.S.C. Section 1004 (now 5 U.S.C. 554(e));
c. Having had full opportunity to submit and having submitted all its evidence and arguments under the Commission's Modified Procedure;
d. Failing to seek cross-examination or oral hearing;
e. Failing to take steps for administrative review of the Commission's order by Division 2;
f. Failing to seek judicial review and
g. Moving for summary judgment upon all the evidence submitted to the Commission after the expiration of the time for seeking judicial review.

In its statement of the case the Petitioner while stating that it had moved to stay action in the District Court (Petitioner's Brief page 4) neglected to set forth the grounds upon which it sought the stay. Petitioner's motion (Respondent's Appendix B, p. 29) stated that the action should "be stayed for the reason that there are certain underlining (sic) factual issues involved which are determinative of the rights of the parties to this action which are within the primary jurisdiction of and/or must be properly resolved by the Interstate Commerce Commission."

The Respondent agrees. The Petitioner cited seven cases (Respondent's Appendix B, page 29) which clearly and correctly support the motion.

The Petitioner contends that the Commission erred in

confining itself to the four assumptions set down in the District Court's order. (Petitioner's Appendix C, page 41).

The first assumption concerning the question of whether or not, "there was an oral agreement or a novation of a written agreement under which Locust Cartage Company, Inc. agreed to carry for Transamerican Freight Lines, Inc. goods which were covered by shipping contracts between Transamerican Freight Lines, Inc. and its customers.", is purely a question of contract law within the proper jurisdiction of the District Court and not of the Commission.

As to the second and third assumptions that the actual carriage was within points Petitioner was authorized to serve and that the shippers paid Petitioner as though it had performed the service, there was no serious dispute. The Respondent contends that these assumptions were immaterial.

The fourth assumption is the basis for Petitioner's defense to the action and is the cornerstone of its contention that it has been deprived of due process. In this regard the District Court stated:

> "The fourth assumption is that Transamerican Freight Lines, Inc. did not have complete control of the operations of Locust Cartage Company, Inc. *With respect to the fourth assumption, a more detailed statement may be made by the parties.*" (Emphasis supplied) (Petitioner's Appendix C, page 43).

The parties submitted evidence and argument to the Commission. On the basis of this evidence, the Interstate Commerce Commission hearing examiner concluded that Respondent's operations exhibited the characteristics of a common carrier rather than those of a mere cartage operator and that Respondent was therefore bound to charge

its published tariff for service outside the commercial zone of Boston.[2]

In its brief to the Court of Appeals Petitioner said:

> "The chief ... 'underlying factual issue' asserted to be within the expertise of the Commission was the issue of whether Transamerican 'controlled' Locust's operation since a determination that Transamerican did control Locust's operation would, by itself, terminate the matter."

Conversely, a determination that Petitioner did not control Respondent's operations would likewise terminate the matter. Thus, following Petitioner's own contention, this matter has been terminated by the finding by the Commission and the District Court, affirmed by the Court of Appeals, that Petitioner did not control Respondent's operations.

The Commission (Division 2) in its Decision (Petitioner's Appendix F at page 60) stated:

> "Although the Court assumed a lack of complete control by Transamerican, the parties submitted evidence and argument directed to this issue and the examiner found that the facts supported such a finding. The examiner concluded that Respondent's use of its own equipment and routing under its own authority and the employment of its own drivers gave credence to the assumption that there was an independent operation by Locust. He further concluded that the intention of the parties was that Locust was to be an independent contractor, and that an exclusive agency was not contemplated. Thus the actions of Locust in ob-

[2] Exempt under 49 U.S.C. Section 302(c)(2)—49 C.F.R. Section 1057.

taining its operating authority as a common carrier were not inconsistent with its original intention." (Petitioner's Appendix F, page 70).

The District Court in reviewing the same evidence found: (Petitioner's Appendix A), "Defendant did not control plaintiff's operations." (page 23), substituted its finding that plaintiff was "defendant's exclusive agent" (page 25) and concluded "plaintiff at the relevant dates was operating not as a common carrier but merely as an independent contractor who was not a common carrier." (page 26).

Although, as will be shown later, the Court of Appeals was correct in ruling that the District Court erred in substituting its own findings and conclusions for those of the Commission, it is to be noted that nowhere in the Interstate Commerce Act is there any provision for performance of a transportation service of the type here involved by an "independent contractor who was not a common carrier."

Having all the evidence before it, the Commission rightly concluded that the answer to the Court's direction, "that the ruling should determine the applicable tariffs for the movements handled by Locust for Transamerican" (Petitioner's Appendix F, page 60) was:

> "We find that, as to the involved movements which took place outside the commercial zone of Boston, Mass., between February 8, 1962 and October 14, 1964, the date on which it joined the tariffs of the Eastern Central Motor Carriers Association, Inc., the tariffs of the New England Motor Rate Bureau, Inc., (Locust's tariff agent) applied for those portions of the movement handled by Locust Cartage Co., Inc., a common carrier by Motor vehicle, or its predecessor." (Petitioner's Appendix F, page 63)

The Petitioner, however, argues that despite an informal staff opinion, (Petitioner's Appendix D, page 45), which Petitioner rejected and a formal opinion, *Transamerican Freight Lines, Inc. — Petition For Declaratory Order* 335 I.C.C. 46 (all of which proceedings took from September 30, 1966 to May 7, 1969 to complete), the decision of the Commission was merely an "advisory opinion" and as such subject to de novo review.

In the instant case the Court of Appeals (Petitioner's Brief Appendix B, pages 34, 35) held that the Commission's statement:

> "The function of the Commission in this proceeding is to render administrative aid to the Court. Therefore, the examiner was correct in confining his consideration of the issue to those reflecting the Court's assumption" 335 I.C.C. at 50,

was "an accurate description of the limited administrative role in cases which raise both broad issues of regulatory policy and specific questions of contractual liability. See, e.g. *Thompson Trustee* v. *Texas Mexican Railway System, Inc.*, 328 U.S. 134 (1946)." This case was cited by Petitioner as authority for granting its motion to stay proceedings (Respondent's Brief Appendix B, page 29).

To bolster its retreat from its contention previously urged before the District Court that the Commission had primary jurisdiction, the Petitioner now contends that *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125 (previously asserted as its authority for invoking the primary jurisdiction doctrine) is its authority for holding that the Commission's decision is not binding. In *Pennsylvania Railroad Co.* v. *United States*, 363 U.S. 202, 205 citing *Rochester Telephone Corp.* v. *United States*, supra, the Court stated:

> "We decided some years ago that while a mere 'abstract declaration' on some issue by the Commission may not be judicially reviewable, an order that determines a 'right or obligation' so that legal consequences will flow from it is reviewable..."

The finding by the Commission that Locust's published tariff applied rather than those contained in a private agreement had, as a published opinion, an immediate and practical effect on all carriers similarly situated.

> "The determination made by the Commission is therefore not abstract, theoretical or academic." *Pennsylvania Railroad Co.* v. *United States,* supra.

The Commission's order was both declaratory and reviewable. *Frozen Food Express* v. *United States,* 351 U.S. 40. See *Interstate Commerce Commission* v. *Atlantic Coast Line R. Co.,* 383 U.S. 576, 602, 604.

The petitioner attaches significance to the form of the Declaratory Order issued by the Commission. The proceeding before the Interstate Commerce Commission was initiated by Petitioner's *petition for Declaratory Order* and the Commission rendered its *declaratory determination* that the tariffs of the New England Motor Rate Bureau, Inc., Respondent's agent, applied to the involved transportation service. This determination by the Commission was a *Declaratory Order* sought by the Petitioner. *Shannahan* v. *United States,* 303 U.S. 596, 599 (cited in Petitioner's Brief p. 11) involved the so-called Negative Order Doctrine and is inapposite. The Court has in many instances stated that an order does not have to be coercive to be binding. *Pennsylvania Railroad Co.* v. *United States,* supra. See *Lester C. Newton Trucking Company* v.

United States, 209 F. Supp. 600 *affirmed* 372 U.S. 702, in which an "interpretive order" was declared reviewable.

The argument "If such promulgations are not subject to judicial review, it is surely because they are not final or binding on the parties involved" (Petitioner's Brief, page 11) falls of its own weight. *Riss & Co.* v. *Interstate Commerce Commission*, 179 F2d 810; *Washington Terminal Co.* v. *Boswell*, 124 F2d 235.

The Petitioner's argument that the Commission's finding was a conclusion of law and not one of fact and therefore the District Court was free to disregard it is answered in *Seaboard Airline Railroad Co.* v. *United States*, 387 F2d 651, where the plaintiff argued that the issue referred to the Commission was one of law and not of fact and therefore not binding. The Court held that the plaintiff was not entitled to a trial de novo as the reference had been made on its motion and that the 1964 amendment to 28 U.S.C. sections 1336 and 1398 did not change the law relative to the scope of review.

A recent Court of Claims case is in accord with the finding of the Court of Appeals in this action:

In *McLean Trucking Company* v. *United States*, 387 F2d 657 (Court of Claims) it was held:

> "Since the primary jurisdiction of the Commission has been invoked on the issue to be decided, we are reminded that the scope of our review is narrow. Unless the findings of the Commission are contrary to law, arbitrary, capricious or unsupported by substantial evidence they may not be set aside. *General Motors Corp.* v. *United States*, 324 F2d 604, 605 (6th Circuit 1963)."

As the courts have often said, the judicial function is exhausted when there is found to be a rational basis for

the Commission's conclusions. *Mississippi Valley Barge Co.* v. *United States*, 292 U.S. 282, 286-7 (1934). "After reviewing the record and weighing defendant's contentions in the light of these long-established precepts, we find that there is a rational basis for the Commission's conclusions."

The instant case, like the *McLean case*, supra, is governed by the provisions of 28 U.S.C. section 1336 (Respondent's Brief Appendix A, page 23) providing for exclusive jurisdiction in the District Court of cases referred to the Interstate Commerce Commission. Unlike *McLean*, the Petitioner here did not file action for review within 90 days in compliance with 28 U.S.C. section 1336(c) nor was the United States denominated party defendant as provided for in 28 U.S.C. section 2322. Accordingly, the Order of the Interstate Commerce Commission became final and binding on the Court as well as the parties.

In *Elgin Joliet and Eastern Railway Co.* v. *Benjamin Harris & Co.*, 245 F. Supp. 467 (1965) a similar situation existed and the Court held (at 471):

> "The effect of an agency determination—and hence the function of the Court once that determination became final—depends upon the effect which judicial action will have on the statutory scheme of regulation. If an Interstate Commerce Commission determination as to the reasonableness of rates were subject to collateral attack in each of the District Courts of the land, the regulatory function of the Commission would atrophy from impotence. Hence, as Justice Black pointed out, (*Pennsylvania R. Co.* v. *United States*, 363 U.S. 202) once the steps for direct judicial review of the Inter-

state Commerce Commission decision have been taken (or, as here, are not pursued) and the order becomes final, the outcome of the pending civil litigation is determined."

Inasmuch as the Commission's decision(335 I.C.C. 46) became final and binding on the District Court it could not be "rejected" (Petitioner's Appendix A, pages 25, 26). The Court of Appeals, however, provided the review which should have taken place under the provisions of 5 U.S.C. 706. The Court of Appeals, after a complete review of the entire record, found that the Commission's order was based upon substantial evidence and that it did not exceed the Commission's statutory authority (Petitioner's Brief, Appendix B, page 35 and cases cited). *Boston & Maine Railroad Co.* v. *United States,* 208 F. Supp. 661, *affirmed* 371 U.S. 26.

Although not argued by the Petitioner, it is clear that use of Modified Procedure by the Commission did not result in a denial of due process, *Yakus* v. *United States,* 321 U.S. 414, 436, particularly when the Petitioner made no request for cross-examination or other oral hearing. *Veillette* v. *Bowles,* 150 F2d 862.

Due process does not require oral hearing when, as here, there is no material factual conflict. The Courts have consistently held that fundamental fairness and due process are provided under the Interstate Commerce Commission's Modified Procedure. *National Trailer Convoy, Inc. et al.* v. *United States of America and Interstate Commerce Commission,* ('68) 293 F. Supp. 630 (DC - Okla.) *Aff'd. per curiam* ('69) 394 U.S. 849.

II. The District Court Was Not the Ultimate Trier of Fact on Issues Submitted to and Within the Primary Jurisdiction of the Interstate Commerce Commission.

The Petitioner having waived its right to a jury argues that the Court then becomes the "ultimate trier of fact," — in effect, the jury.

That this argument is fallacious and without merit is amply proven by the decisions. In *Cox* v. *United States*, 332 U.S. 442, 453 the Court said:

> "The concept of a jury passing independently on an issue previously determined by an administrative body is contrary to settled administrative practice; the constitutional right to have a jury trial does not include the right to have a jury pass on an administrative order. *Yakus* v. *United States*, 321 U.S. 414."

A rate different from the established rate under 49 U.S.C. Section 317 is void but the transportation is not wrongful and the legal charge therefor is recoverable. *Artic Roofing* v. *Travers*, 32 A2d 559.

The general policy that a rate filed with the Commission must be observed pervades the regulation of common carriers and is enforced by permitting any undercharges to be recovered in order to preserve the integrity of the filed rates. *Bowser & Campbell* v. *Knox Glass Inc.*, 390 F2d 193 (3rd Cir.) *cert. denied* 392 U.S. 907 (1968). This case is cited in the opinion of the Court of Appeals herein as compelling and applicable to the instant case. (Petitioner's Brief, Appendix B, page 39).

III. The Doctrines of Estoppel and Pari Delicto Are Not Applicable.

A motor carrier has a statutory duty and obligation to enforce collection of its lawful charges when the amounts paid for transportation are not in accordance with its published tariffs as filed with the Interstate Commerce

Commission. *Artic Roofing* v. *Travers*, supra, citing *Kansas City So. Railway* v. *Carl*, 227 U.S. 639.

The Interstate Commerce Commission has exclusive jurisdiction to determine the lawfulness of rates contained in tariffs filed with it. *Baltimore & Ohio R. Co.* v. *Pitcairn Coal Co.*, 215 U.S. 481; *Mitchell Coal & Coke Co.* v. *Pennsylvania R. Co.*, 230 U.S. 247 (258-9) (cited by Petitioner in its Motion to Stay Action); *Terminal R. Association of St. Louis* v. *United States*, 266 U.S. 17.

Petitioner cites *Norfolk Southern Bus Corp.* v. *Virginia Dare Transportation Co., Inc.*, 159 F2d 306, *cert. denied* 331 U.S. 827 and *Shirks Motor Express Corp.* v. *Forster Transfer and Rigging Co., Inc.*, 133 A2d 59 (Md. 1957) as conflicting decisions warranting the granting of certiorari and holding that the legal doctrine of pari delicto is sufficient to prevent one common carrier from seeking undercharges from another common carrier.

Both cases can be distinguished on their facts. In the *Norfolk Southern Bus Co. case*, the parties were found to have entered into a pooling contract which was forbidden by the Interstate Commerce Act unless prior approval had been obtained from the Commission, 49 U.S.C. Section 305(1) and also the contract was in violation of the Sherman Anti-Trust Act Section 1, (15 U.S.C. 1) as being in restraint of trade.

In the *Shirks case*, the plaintiff was held to be in pari delicto because it had prior knowledge of and participated in an illegal contract. The contract in the instant case was not illegal; only the rates were improper. *Bowser & Campbell* v. *Knox Glass, Inc.*, supra.

Petitioner's citation of *Missouri Pacific Railroad Co.* v. *National Milling Co., Inc.*, 409 F2d 882 is inapposite. There the Court held that where a carrier marked a shipment prepaid in error and consignee reimbursed the insolvent consignor the amount of the freight bill, the consignee

could not be compelled to pay twice and the carrier could not recover.

It is submitted that the decision in the present case is in accord with *Bowser & Campbell* v. *Knox Glass, Inc.*, supra, a Third Circuit case and *Nyad Motor Freight, Inc.* v. *W. T. Grant Company*, D.C. So. Dist. NY February 13, 1970, wherein the Court stated:

> "It would be of no legal effect that the plaintiff and defendant had in fact agreed upon the reduced rates for carriage. Regulation was established by Congress in this field to avoid the ill effects of cut-throat competition. The integrity of the regulatory scheme requires that the companies abide by the filed rates. That scheme is so inviolate that the carrier will not be prevented from recovering the difference between the rate charged and the filed rate even by such common law defenses as estoppel, waiver, unclean hands or in pari delicto." citing *Bowser & Campbell* v. *Knox Glass, Inc.*, supra.

Nor was the Commission's decision in conflict with *Murphy Motor Freight Lines, Inc., Investigation and Revocation of Certificate*, 99 MCC 707 (1965) which involved a claim of unlawful lease arrangements which were rectified before the Commission rendered its final decision.

Although conceding that a carrier can recover undercharges from a shipper, the Petitioner cites *Little Rock & M. R. Co.* v. *St. Louis S. W. Railway Co.*, 63 F 775, 781 (Petitioner's Brief, page 16) as authority for contending that Respondent cannot recover undercharges from it. This case merely held that one railroad could make arrangements with one carrier for through billing, rating and use of terminals and tracks and not make similar arrangements

with other carriers. This case has been abrogated by Statute 49 U.S.C. Section 1(4).

No provision of the Interstate Commerce Act authorizes a common carrier in the absence of joint rates, as provided in 49 U.S.C. Section 316(c), to furnish transportation service for another common carrier under a contractual arrangement providing special compensation differing from that contained in its published tariffs. The Act clearly contemplates that the compensation which a motor common carrier receives from transportation service shall either be based upon its published tariffs (rates) filed with the Commission, where the haul is local, or takes the form of divisions of joint rates filed with the Commission, where the haul is joint, both divisions and rates being subject to Commission regulation. *Interstate Commerce Commission* v. *Baltimore and Ohio R.R. Co.,* 225 U.S. 326 cited with approval in *L. T. Barringer & Co.* v. *United States et al.,* 319 U.S. 1, 6, wherein the Court held the Act prohibited any differentiation of rates due to the identity of the one requesting the service.

The collection by an interstate carrier of a lower rate, other than that which is required under tariffs filed by the carrier, constitutes a discrimination in favor of the one paying the rate regardless of the intention of the parties. *Porto Transportation, Inc.* v. *Conso'idated Diesel Electric Corp.,* D.C.N.Y., 19 F.R.D. 256. *Interstate Commerce Commission* v. *North Pier Terminal Co.,* 164 F2d 640, held that a rebate, which the Interstate Commerce Act prohibits a carrier from making, need not be to an actual shipper and the Circuit Court in sustaining the District Court cited *Union Pacific Railroad* v. *United States,* 313 U.S. 450, as authority for holding that a rebate, which is prohibited, need not be to the shipper.

Section 1 of the Elkins Act, 49 U.S.C. Section 41, forbids "any person, persons or corporation" to give or receive any concession in respect to transportation, and the phrase

"any person, persons, or corporation" includes carriers as well as shippers. *United States* v. *Braverman*, 373 U.S. 405; *American Trucking Association* v. *Atchison, Topeka & Santa Fe Railroad Co.*, 387 U.S. 397.

IV. Decision of Court of Appeals Does Not Raise a Question of Importance Nor Does It Conflict With Decisions of Other Courts.

It is obvious that there is no important question of Federal law which has not already been settled by this Court. The basic issue in this action is: Can Petitioner avoid the requirements of the Interstate Commerce Act by entering into a contract for carriage with another carrier? This Court, as long ago as 1906, decided the answer to this question in the negative.

In *New Haven Railroad* v. *Interstate Commerce Commission*, 202 U.S. 361 at 391 the Court said,

> "It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences and all other forms of undue discrimination. To this extent and for these purposes the statute was remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve. That a carrier engaged in interstate commerce becomes subject as to such commerce to the commands of the statute, and may not set its provisions at naught whatever otherwise may be its power when carrying on commerce not interstate in character, cannot in reason be denied."

In its Order (Petitioner's Brief Appendix F, page 62) the Commission pointed this out and it said,

> "On account of their past association and contractual relationship, Transamerican alleges that Locust was not a common carrier with respect to Transamerican, regardless of its public status otherwise. This implies that a carrier may avoid the requirements of the national transportation policy and the Interstate Commerce Act merely by entering into a contract for carriage with another carrier. The power of Congress to regulate commerce cannot be fettered by the maintenance of existing agreements which conflict therewith. The result would be to withdraw as much of the regulation of commerce from the control of Congress as private individuals arbitrarily choose. See *Colorado Interstate Gas Co.* v. *Federal Power Com'n.*, 142 F.2d 943, 953 (1944), citing *Sproles* v. *Binford*, 286 U.S. 374, 390 (1932)."

The Respondent submits that the decision of the Court of Appeals in this case does not conflict with decisions of other courts. The cases of *Norfolk Southern Bus Corp.* v. *Virginia Dare Transportation Co., Inc.*, supra, and *Shirks Motor Express Corp.* v. *Forster Transfer and Rigging Co., Inc.*, supra, cited by Petitioner, are clearly distinguishable from the instant case on their facts as previously argued by the Respondent herein (Respondent's Brief page 16). In fact, the decision is wholly consistent with the decisions of the Third Circuit, *Bowser & Campbell* v. *Knox Glass, Inc.*, supra, the District Court in *Nyad Motor Freight, Inc.* v. *W. T. Grant Company*, supra, previously argued herein (Respondent's Brief, page 17) and the Court of Claims in *McLean Trucking Company* v. *United States*, supra, (Respondent's Brief, pages 12-13).

V. Unreasonable Delay by Petitioner.

The records show that this litigation has been constantly delayed by the Petitioner's conduct. Petitioner delayed from late 1963 (when Respondent was advised by representatives of the Interstate Commerce Commission that the rate was improper) until October, 1964 when a concurrence became effective, nearly a year later. On November 29, 1966 the Court ordered the parties to seek the Interstate Commerce Commission's opinion (which Respondent did—Petitioner's Appendix D, page 45) and the Petitioner neglected to comply with the Court's order until October 3, 1967 when it suddenly asserted the Commission's primary jurisdiction (Respondent's Appendix B, page 29). This action resulted in another delay until May 7, 1969 and further court proceedings were delayed until after rights to judicial review in accordance with 28 U.S.C. Section 1336(c) had expired.

In the light of the Petitioner's unreasonable delay and the fact that its petition is without merit, it is urged that this controversy terminate now. *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 621.

Conclusion

For the foregoing reasons, the Respondent hereby respectfully requests that the petition be denied and for the Court to adjudge to the Respondent reasonable damages for its delay in accordance with the provisions of Rule 56(4) of the Rules of the Supreme Court.

Respectfully submitted,

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APPENDIX A

Statutes and Rules of Court Involved

5 U.S.C. § 554

* * *

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty. Pub.L. 89-554, Sept. 6, 1966. 80 Stat. 384.

5 U.S.C. § 706. Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall

review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.

28 U.S.C. § 1336 Interstate Commerce Commission's Orders

* * *

(b) When a district court or the Court of Claims refers a question or issue to the Interstate Commerce Commission for determination, the court which referred the question or issue shall have exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission arising out of such referral.

(c) Any action brought under subsection (b) of this section shall be filed within 90 days from the date that the order of the Interstate Commerce Commission becomes final. As amended Aug. 30, 1964, Pub.L. 88-513, § 1, 78 Stat. 695.

49 U.S.C. § 316(b) [Duties of Common Carriers]

(b) It shall be the duty of every common carrier of property by motor vehicle to provide safe and adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce; to establish, observe, and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto and to the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, and all other matters relating to or connected with the transportation of property in interstate or foreign commerce.

49 U.S.C. § 317(b)

(b) No common carrier by motor vehicle shall charge or demand or collect or receive a greater or less or different

compensation for transportation or for any service in connection therewith between the points enumerated in such tariff than the rates, fares, and charges specified in the tariffs in effect at the time; and no such carrier shall refund or remit in any manner or by any device, directly or indirectly, or through any agent or broker or otherwise, any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities for transportation in interstate or foreign commerce except such as are specified in its tariffs: Provided, That the provisions of sections 1(7) and 22 of this title shall apply to common carriers by motor vehicles subject to this chapter.

INTERSTATE COMMERCE COMMISSION GENERAL RULES OF PRACTICE

Rule 53—Modified procedure; hearings.

(a) *Request for cross examination or other hearing.* If cross examination of any witness is desired the name of the witness and the subject matter of the desired cross examination shall, together with any other request for oral hearing, including the basis therefor, be stated at the end of defendant's statement or complainant's statement in reply as the case may be. Unless material facts are in dispute, oral hearing will not be held for the sole purpose of cross examination.

(b) *Hearing issues limited.* The order setting the proceeding for oral hearing, if hearing is deemed necessary, will specify the matters upon which the parties are not in agreement and respecting which oral evidence is to be introduced.

REHEARING; REARGUMENT; OR RECONSIDERATION

Rule 101—Petitions for rehearing, reargument, or reconsideration.

(a) *In general.* (1) A petition seeking any change in a decision, order, or requirement of the Commission should specify whether the prayer is for reconsideration, reargument, rehearing, further hearing, modification of effective date, vacation, suspension, or otherwise.

(2) *Administrative finality of division and employee board decisions.* All decisions, orders, or requirements of a division of the Commission in any proceeding shall be considered administratively final, except those involving issues of general transportation importance, those wherein the division reverses, changes, or modifies a prior decision by a hearing officer, and those wherein the initial decision is made by a division: *Provided, however,* That this subparagraph shall not preclude the seasonable filing of a petition for relief under paragraphs (b) and (c) of this section, to be considered and disposed of by the division or appellate division which made the decision, order, or requirement as to which relief is sought. Decisions of an employee board, whether original or on review, are not administratively final. Such employee board decisions shall be subject to review by an appropriate appellate division of the Commission upon the filing of a timely petition in accordance with these rules of practice.

(3) *Limitations on petitions for review of division decisions.* Pursuant to authority granted in section 17(6) of the Interstate Commerce Act, the right to apply to the entire Commission for rehearing, reargument, or reconsideration of a decision, order, or requirement of a division of the Commission in any proceeding shall be limited and restricted to those proceedings in which the entire Commission, on its own motion, determines and announces that an issue of general transportation importance is involved. In proceedings in which no such announcement has been made, but in which a division reverses, changes, or modifies a prior decision by a hearing officer or where the initial

decision is made by a division, a petition to the same division for rehearing, reargument, or reconsideration of its decision will be permitted and will be considered and disposed of by such division in an appellate capacity and with administrative finality.

(4) *Petitions seeking a finding that an issue of general transportation importance is involved; 3-page limitation; time for filing; no reply permitted.* In any proceeding which has involved the taking of evidence at oral hearing or by modified procedure in which the Commission has not noted the presence of an issue of general transportation importance, any party may, within 15 days after the service of a final decision, order, or requirement of a division or appellate division, as to which the filing of a petition for rehearing, reargument, or reconsideration is not permitted, file a petition requesting the Commission to find on its own motion that the proceeding is one involving an issue of general transportation importance. Any petition seeking such a finding shall not be considered an application for rehearing, reargument, or reconsideration within the meaning of section 17 of the act and shall not exceed 3 pages. No reply thereto may be filed and the ruling thereon will be final. Petitions seeking the relief specifically covered herein will not be entertained at any other stage of the proceeding.

(5) *Copies of petitions and replies.* In cases in which it has been determined and announced that an issue of general transportation importance is involved, there shall be furnished for the use of the Commission the original and 14 copies of each petition filed under this section and of replies to such petitions. A like number of copies shall be furnished of petitions seeking a finding that the proceeding involves an issue of general transportation importance. In all other cases, the original and 7 copies of such petitions and replies shall be furnished for the use of the Commission.

(b) *Rehearing or further hearing.* When in a petition filed under this section opportunity is sought to introduce evidence, the evidence to be adduced must be stated briefly, such evidence must not appear to be cumulative, and explanation must be given why such evidence was not previously adduced.

(c) *Modification of effective date.* A petition under this section seeking only modification of the effective date of a decision, order, or requirement, or in the period of notice, or other period or date prescribed therein, must be filed seasonably, except that, in case of unforeseen emergency satisfactorily shown by petitioner, such relief may be sought informally by telegram or otherwise, provided like notice is simultaneously communicated to all parties of record.

(d) *Reconsideration.* If relief under this section other than under paragraphs (b) and (c) is sought, the matters claimed to have been erroneously decided and the alleged errors or relief sought must be specified with the particularity respecting exceptions as outlined in Rule 96(a), as should also any substitute finding or other substitute requirement desired by petitioner.

(e) *Time for filing.* Except for good cause shown, and upon leave granted, petitions under this section must be filed within 30 days after the date of service of a decision or order, except as otherwise provided in the special rules of practice.

(f) *Successive petitions on same grounds, not entertained.* A successive petition under this section submitted by the same party or parties, and upon substantially the same grounds as a former petition, which has been considered and denied by the entire Commission will not be entertained.

(g) *Petitions for reconsideration of appellate division decisions on review of board decisions.* When an ap-

pellate division has denied a petition seeking a reversal, change, or modification of a determination whether original or on review by a board of employees, any further petition for reconsideration by the same party or parties upon substantially the same grounds will not be entertained. If in the consideration of such a petition, however, by the appellate division, the previous determination of the board of employees has been reversed, changed, or modified, a further petition may be filed by any party to the proceeding adversely affected by the decision of the appellate division, within the time specified in paragraph (c) of this section, and the petition will be considered and disposed of by the same appellate division which passed upon the initial petition.

Rule 102—Petitions not otherwise covered.

When the subject matter of any desired relief is not specifically covered by the rules in this part, a petition seeking such relief, which relief shall be construed as including appropriate discovery procedures, and stating the reasons therefor may be served and filed.

Rules of the Supreme Court of the United States

Rule 56. Interest and Damages

* * *

4. Where a petition for writ of certiorari has been filed, and there appears to be no ground for granting such a writ, the court may, in appropriate cases, adjudge to the respondent reasonable damages for his delay.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

Civil Action No. 65-144-W

LOCUST CARTAGE COMPANY, INC.

v.

TRANSAMERICAN FREIGHT LINES, INC.

MOTION TO STAY ACTION

Defendant moves that this action be stayed for the reason that there are certain underlining factual issues involved which are determinative of the rights of the parties to this action which are within the primary jurisdiction of and/or must properly be resolved by the Interstate Commerce Commission.

Thompson, Trustee v. *Texas Mexicon Railway System*, 328 U.S. 134 (1946)
General American Tank Carrier Corp. v. *El Dorado Terminal Co.*, 308 U.S. 422 (1939)
Rochester Telephone Corp. v. *U.S. et al*, 307 U.S. 125 (1939)
Great Northern Railway Company v. *Merchants Elevator Co.*, 259 U.S. 285, 291 (1922)
Mitchell Coal & Coke Company v. *Pennsylvania Railroad Co.*, 230 U.S. 247 (1912)
Southern Railroad Co. v. *Tift*, 206 U.S. 408 (1907)

Texas & Pacific Railroad Company v. *Abilene Cotton Oil Co.*, 204 U.S. 426.

By its attorney,

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